Supreme Court, U.S.
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No. 86-6867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,

v.

C. PAUL PHELPS, Secretary,
Louisiana Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 12, 1987
CERTIORARI GRANTED JUNE 22, 1987

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October 29, 1982	Bill of Information
May 15, 1984	Jury charges in 24th Judicial District of Jefferson Parish, Louisiana
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May 22, 1984	Motion for New Trial
May 29, 1984	Sentencing
July 20, 1984	Notice of Appeal
December 2, 1985	Supreme Court of Louisiana decision affirming conviction and sentence.
May 27, 1986	Petition for Certiorari to United States Supreme Court denied.
August 9, 1986	Application for Rehearing of Petition for Certiorari denied.
September 3, 1986	Death warrant signed for November 19, 1986.
November 12, 1986	Petition for Post Conviction Relief and STay of Execution denied by 24th Judicial District of Jefferson Parish.
November 14, 1986	Petition for Post Conviction Relief and Stay of Execution denied by Louisiana Supreme Court.
November 17, 1986	Petition to United States District Court of the Eastern District of Louisiana for a Writ of Habeas Corpus and Stay of Execution.
November 18, 1986	Stay of Execution entered.
February 12, 1987	Federal District Court evidentiary hearing
April 1, 1987	Petition for Habeas Corpus denied.

April 7, 1987	Death warrant signed by 24th Judicial District for May 7, 1987.
April 25, 1987	Application to Federal District Court for Stay of Execution pending appeal and for a Certificate of Probable Cause to Appeal.
April 30, 1987	Application for Stay of Execution and Certificate of Probable Cause denied.
May 4, 1987	Application to United States Court of Appeals for the Fifth Circuit for Certificate of Probable Cause to Appeal, Stay of Execution, and Motion to Proceed *In Forma Pauperis*.
May 6, 1987	Stay of Execution granted until May 14, 1987, by 24th Judicial District of Jefferson Parish, Louisiana
May 11, 1987	Application for Certificate of Probable Cause and Stay of Execution in Fifth Circuit denied.
May 12, 1987	Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* filed in United States Supreme Court.
May 12, 1987	Stay of Execution granted by Louisiana Supreme Court for thirty days.
May 13, 1987	Death warrant signed by 24th Judicial District for June 17, 1987.
June 10, 1987	Opposition of State of Louisiana to Petition for Certiorari filed.
June 16, 1987	Stay of Execution pending disposition of Petition for Certiorari ordered by United States Supreme Court.
June 22, 1987	Writ of Certiorari and Petition for Leave to Proceed *In Forma Pauperis* granted by United States Supreme Court.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

No. 82-3478

Division "N"

STATE OF LOUISIANA

vs.

LESLIE LOWENFIELD

Date 5-14-84
SANDI BIRD

District Attorney A. Lentini/G. Gremillion

Judges James Cannella

At the hour of 9:55 a.m. court took up the open trial in the above entitled matter.

All present—

Jury returned to the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

Sequestration order placed on witnesses during trial, is now removed, by order of the court.

At the hour of 11:30 a.m. Judge James L. Cannella read charges to the jury.

At the hour of 11:45 a.m. the three alternate jurors were discharged, and the twelve jurors retired to the jury room to deliberate on said charges.

At the hour of 1:20 p.m. Jury returned to the courtroom to ask the court three questions and to request for some evidence.

At the hour of 7:45 p.m. jurors returned to courtroom with note, (filed into evidence) that they are tiring and want to retire for the evening and resume deliberations in the morning.

Court granted jurors request, and recessed for the day, to return on 5-15-84 @ 9:30 a.m.

The jury was ordered sequestered and removed under the custody of the deputy sheriff, and were admonished as to the rules of sequestration. Defendant remanded to N.O.P.P. until 5-15-84 @ 9:30 a.m.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-15-84

At the hour of 10:05 a.m. the court took up the open deliberations as to the verdict in the above entitled matter.

All present—

Jury returned to the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

The court ordered the twelve jurors back into the jury-room to continue deliberating on the charge of R.S.14:30 —first degree murder (5-counts).

At the hour of 1:00 p.m. jurors returned to courtroom with note (filed into evidence) requesting more evidence.

At the hour of 3:05 p.m. the jury returned to the court-room with a verdict:

Verdict returned:

Count 1—(as to Sheila Thomas)—Guilty of first degree murder

Count 2—(as to Shantell Osborne)—guilty of man-slaughter)

Count 3—(as to Carl Osborne)—guilty of first degree murder)

Count 4—(as to Myrtle Griffin)—guilty of first degree murder)

Count 5—(as to Owen Griffin)—guilty of manslaughter)

Signed: Anthony Canzoneri, Foreman

The jury was polled by writing as to their individual verdicts as to all five counts and ordered signed by that juror.

All five verdicts declared legal and ordered recorded.

At this time the jury was removed from the courtroom by the deputy sheriff.

Defense counsel requested to the court a (24) to (48) hour delay of penalty hearing at to the first degree murder verdicts (Ct. 1, Ct. 3, Ct. 4), State objected as to the long delay—court denied defense counsel's request, and ordered court to resume in one (1) hour.

At the hour of 6:05 p.m., court took up the penalty hearing as to counts 1, 3, & 4.

(Out of the Presence of the jury)—W/Leslie Lowenfield
Jury returned to the courtroom under the custody of the deputy sheriff, polling waived.

State Evidence Presented:

S-PH #1—Certified copy certificate of conviction in Canada for aggravated rape

S-PH #1a—Copy of S-PH #1 (amended)—certificate of conviction/acquittel sentence

S-PH #2—Certified copy of #82-3265—State of Louisiana vs. Leslie Lowenfield for harassing phone calls

And all evidence and stipulations introduced at first part of trial.

State rests.

Defense Evidence:

Resubmitted all former exhibits received into evidence in first part of trial.

At the hour of 8:10 p.m. Judge James L. Cannella read the charges to the jury.

At the hour of 8:17 p.m. the twelve jurors retired to the juryroom to deliberate on the penalty hearing.

At the hour of 11:27 pm.. the jurors returned to the courtroom with question (note filed into evidence)

At the hour of 11:55 p.m. the jurors returned to the courtroom with a note (file into evidence) stating that they are tiring and request to retire for the night and to resume on 5-16-84 @ 9:30 a.m.

Court granted jurors request.

The jury was ordered sequestered and removed under the custody of the deputy sheriff, and were admonished as to the rules of sequestration.

The defendant remanded to N.O.P.P. until 5-16-84 @ 9:30 a.m.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-16-84

At the hour of 9:40 a.m. the court took up the open deliberations as to the penelty hearing of the trial:

All present—

The jurors returned into the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

The court ordered the twelve jurors back into the jury-room to continue deliberating as to the penelty hearing of the trial.

At the hour of 11:45 a.m. defense counsel, (out of the presence of the jury), made an oral motion for a mis-trial on the grounds as to the length of time the jurors were taking deliberating as to the penelty hearing:

Motion argued—and submitted—

Court denied said motion.

At the hour of 3:00 p.m., defense counsel (out of the presence of the jury), made another motion for mis-trial on the grounds as to the length of time the jurors were taking deliberating as to the penelty hearing:

D-1/letter received from foreman filed into evidence

Motion argued—and submitted:

Jurors returned back into courtroom—

Court asked jury if further deliberations will be helpful in arriving at a verdict:

Each juror individually polled in writing as to their answer.

(Out of the presence of the jury)—Defense counsel re-urged his motion for mis-trial:

D-2/(in Globo) all twelve slips of paper as to the polling of the jurors, filed into evidence.

Court denied the motion for mis-trial.

At the hour of 3:25 p.m. the jury returned to the court-room with a note (they misunderstood previous question the court had asked).

Court asked again if further deliberations will be helpful in arriving at a verdict:

Each juror individually polled in writing as to their answer (second time) state requested second polling filed into evidence.

At the hour of 4:20 p.m. the jury returned to the court-room with a note stating they have arrived at a decision.

Verdict returned:

Count 1—(as to Sheila Thomas)—the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person

2) The victim was a witness in a prosecution against the defendant and gave material assistance to the state in any investigation of the defendant.

Count 3—(as to Carl Osborne)—The jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person.

Count 4—(as to Myrtle Griffin)—The jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person.

The jury was polled by writing as to their individual verdicts as to all three (3) counts and ordered signed by that juror.

All three (3) counts declared legal and ordered recorded.

At the hour of 4:35 p.m. the court recessed for the day and ordered jury released. The court ordered sentencing in this matter set for 5-23-84 @ 9:00 a.m.

Defendant remanded to N.O.P.P. to await sentencing.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-23-84

District Attorney Steve Wimberly

Judge James Cannella

The defendant Leslie Lowenfield appeared before the bar of the court this day represented by Ralph Capitelli and Wayne Walker, attorneys.

The court took up the motion for new trial:

Matter heard—argued and submitted—

Court denied the motion for new trial.

Court continued sentencing date until 5-29-84 @ 9:00 a.m. (Tuesday).

Defendant remanded to N.O.P.P.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-29-84

The defendant Leslie Lowenfield appeared before the bar of the court this day after being tried by a jury and found guilty as follows:

Count 1—Guilty as charged to R.S.14:30—first degree murder

Count 2—Guilty to manslaughter

Count 3—Guilty as charged to R.S.14:30—first degree murder

Count 4—Guilty as charged to R.S.14:30—first degree murder

Count 5—Guilty to manslaughter

The defendant was represented by Ralph Capitelli, attorney. Co-counsel, Wayne Walker was not present.

Having exhausted all further delays, the court sentenced the defendant to:

Count 1—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 2—Imprisonment at hard labor for a term of twenty-one (21) years. And the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in

conformity with L.S.A.-R.S.15:824. Defendant is to be given credit for time served.

Count 3—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 4—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 5—Imprisonment at hard labor for a term of twenty-one (21) years. And the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.-15:824. Defendant is to be given credit for time served.

Court ordered that counts two (2) and five (5) of said sentences are to run consecutively with one another.

At this time defense counsel submitted a written motion to withdraw as counsel of record, (as to both attorneys):

Court granted said motion, and allowed E. Wayne Walker and Ralph Capitelli, to withdraw as attorney's for the defendant; and ordered the Indigent Defender Board for the Parish of Jefferson to appoint an attorney to represent defendant through his appeal.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

NOTES WRITTEN BY JURY

5-14-84

Evidence Requested:

1. Piece of paper recovered by FBI from Lowenfield.

5-14-84
1:20 PM

Questions

1. Please differentiate between *first* and *second* degree murder.
2. Is a unanimous decision required in all four verdicts?
3. Is expert's opinion to be considered as circumstantial or direct evidence when he uses the words "conclusive" and "no doubt".

Evidence required:

1. Copy of defendant's driver's license (certified copy).
2. Federal gun registration form from K-Mart.
3. Letter to Connie Enclade.
4. Letter sent to Michael Thomas.
5. Rifle box with receipt.
6. 2 exemplars
7. Rifle

8. Posterboard handwriting exhibits (2).
9. FBI arrest picture & date
10. Address book (defendant's)
11. Federal form that was used by FBI (signed "James Best")
12. Blue marker
13. Defendant's drawing of Jacksonville beach area

5-14-84
5:45 PM.

Exhibits Requested:

1. Greyhound Bus receipts (3) for packages sent.
2. Defendant's drivers liscence

5-14-84
7:45 PM.

Judge Cannella

The jury is tiring and requests that we have dinner and retire for the evening.

Anthony S. Conzoneri

11:27 PM
5-15-84

Judge Cannella

Please clarify the word "recomends" on both Verdict sheets. Does this mean that the court will have the option to follow the recomendation or is the court bound to follow the recomendation on both.

If a unanimous decision on either verdict can not be reached, is the defendant automatically sentenced to life imprisonment.

Anthony S. Conzoneri

5-15-84

Judge Cannella 11:55 PM.

The jury is tiring and requests that we be allowed to retire for the night and resume in the morning.

Anthony S. Conzoneri

Evidence Requested

1. All Pictures taken in the bedroom of the murder house
2. Pictures of front of house
3. Picture of broken window of house
4. Photo copy of notebook
5. Drivers liscense
6. Letter to Sheila found in Leslie Lowenfield's apartment.
7. Photo copies of letters

Anthony S. Conzoneri

5-15-84

Judge Cannella at 1:00 PM

The jury is having much difficulty in reaching a unanimous decision. We feel that much of the indecision can be resolved if the jury is permitted to review the following:

1. Drivers Liscense
2. Photo copy of note book
3. Photo copies of letters written by Lowenfield.

Please consider our request as to whether the evidence is sent to the jury room or the jury is returned to the courtroom where it can be presented. Much distress is being experienced.

Anthony S. Conzoneri

5-15-84
3:00 PM

Judge Cannella

The jury has reached a verdict

Anthony S. Conzoneri

5-16-84
3:00 PM

Judge Cannella

The jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath we took.

Anthony S. Conzoneri

/s/ Catherine Robert yes

/s/ Richard N. Velleman yes

/s/ Patricia C. Olson yes

/s/ Eugene Robinson no

/s/ Raphael Asavedo [illegible]

/s/ Catherine Grote no

/s/ Gerald Holland no

/s/ Marc L. Addison yes

/s/ Betty Pugh yes

/s/ Frank Weiland yes

/s/ Anthony S. Conzoneri yes

/s/ Sandy Woodie yes

3:25
5-16-84

Judge Cannella

Some of the jurors misunderstood the question

Anthony S. Conzoneri

/s/ Patricia C. Olson yes

/s/ Raphael Asavedo ????

/s/ Catherine Grote yes

/s/ Betty Pugh yes

/s/ Anthony S. Conzoneri yes

/s/ Richard N. Velleman yes

/s/ Eugene Robinson no

/s/ Catherine Roberts yes

/s/ Gerald Holland yes

/s/ Marc L. Addison yes

/s/ Frank Weiland yes

/s/ Sandra Woodie yes

4:20 PM.
5-16-84

Judge Cannella

The jury has reached a decision -

Anthony S. Conzoneri

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT I

(Sheila Thomas)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

The victim was a witness in a prosecution against the defendant & gave material assistance to the state in any investigation of the defendant.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT III

(Carl Osborne)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT IV

(Myrtle Griffin)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

(Caption Omitted in Printing)

Testimony and proceedings taken in the above numbered and entitled cause, in open Court, for the purpose of a trial, Division "N", May 15, 1985, before the Honorable James L. Cannella, Judge presiding.

PROCEEDINGS

THE COURT: Please call the jurors in.

(WHEREUPON THE JURORS ENTER THE COURTROOM)

THE COURT: Please answer present or here when I call your name.

Richard Velleman.

MR. VELLEMAN: Here.

THE COURT: Mark Addison.

MR. ADDISON: Here.

THE COURT: Frank Wieland.

MR. WIELAND: Here.

THE COURT: Patricia Olsen.

MS. OLSEN: Here.

THE COURT: Catherine Roberts.

MS. ROBERTS: Here.

THE COURT: Betty Pugh.

MS. PUGH: Here.

THE COURT: Anthony Canzoneri.

MR. CANZONERI: Here.

THE COURT: Eugene Robin.

MR. ROBIN: Here.
THE COURT: Rafael Asevedo.
MR. ASEVEDO: Present.
THE COURT: Kathrine Grote.
MS. GROTE: Here.
THE COURT: Gerald Holland.
MR. HOLLAND: Here.
THE COURT: Sandra Woodie.
MS. WOODIE: Here.
THE COURT: Ladies and gentlemen I hope you all had a good night and are rested and ready to go today.

Last night before I ordered you to go back to the hotel room I had certain orders relative to stop deliberating, do not discuss the case anymore until you come back today.

I now remove that instruction and that order from you and I order you to go into the jury room, renew your deliberations and arrive at a verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Counsel would you approach the bench, please?

(COLLOQUY AT THE BENCH)

THE COURT: Ladies and gentlemen in the audience I'd like to remind you of the same thing I did yesterday, I believe it was. The jury is going to come back in and I don't want any comments, any sighs, any noise whatsoever from you during the time that I'm talking with the jury or telling the jury anything. They have not reached a verdict yet but I don't want them to pick up anything from the audience's feelings about this case. Everybody understand? Alright.

Please call them back.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. GREMILLION: Yes, Your Honor.

THE COURT: Mister Canzoneri is that the note that you gave to be handed to me?

MR. CANZONERI: Yes; it is, sir.

THE COURT: Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you've put in.

In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you should not hold against either the State or the defendant in this case.

Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

MR. CAPITELLI: Please read that statement back.

(Whereupon the court reporter reads back the last statement)

MR. CAPITELLI: I note an objection to the Judge's last statement to the jury.

THE COURT: Any motions before the jury comes back?

MR. LENTINI: None for the State, Your Honor.

MR. CAPITELLI: I just want to mention, Your Honor, to caution the audience.

THE COURT: Yes, sir.

Ladies and gentlemen I'd like to please warn you again. Please do not make any comments, any exclamations, have any emotional outbursts before the verdicts are read, after the verdicts are read. Please be very quiet, very still.

Thank you.

Call in the jury.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury relative to their attendance?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: The State waives a polling.

THE COURT: Ladies and Gentlemen of the Jury have you arrived at a verdict?

MR. CANZONERI: Yes; we have.

THE COURT: Please hand it to the clerk.

The State of Louisiana versus Leslie Lowenfield, Twenty-Fourth Judicial District Court, Parish of Jefferson, Number Eighty-two Thirty-four Seventy-eight, Division "N":

Verdict

Count One, Sheila Thomas:

We, the jury, find the defendant, Leslie Lowenfield guilty of first degree murder.

Count Two, Shantell Osborne:

We, the jury, find the defendant, Leslie Lowenfield guilty of manslaughter.

Count Three, Carl Osborne:

We, the jury, find the defendant Leslie Lowenfield guilty of first degree murder.

Count Four, Myrtle Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder.

Count Five, Owen Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter.

Gretna, Louisiana, this fifteenth day of May, Nineteen Eighty-four.

Anthony S. Canzoneri, Foreman.

Do you wish a polling?

MR. CAPITELLI: —wish a poll—

THE COURT: We're going to have a polling of the jury and I'm going to pass out five sheets of paper to each juror. Does anyone not have a pencil or pen? Everybody gets five sheets. Does everybody have five sheets?

Mister Canzoneri you have five sheets?

MR. CANZONERI: Yes, sir.

THE COURT: At the top of the first sheet please write count one. Everybody write count one.

I'm going to read what the jury's verdict is then I'm going to ask you is this your verdict. I need you to write yes or no on the sheet of paper and then write your name.

Count one, Sheila Thomas:

We, the jury, find the defendant, Leslie Lowenfield guilty of first degree murder. Is this your verdict? Write yes or no and then write your name, please.

Please pass them down to the end so we can pick them up.

Then write count two on the top of the next sheet of paper.

This is count two; Shantell Osborne:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter. Is this your verdict? Write yes or no and then your name, please.

Count three; Carl Osborne:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder. Is this your verdict? Please write yes or no and write your name.

Please write count four at the top of the paper.

Count four, Myrtle Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder. Is this your verdict? Please write yes or no and sign your name.

Count five reads Owen Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter. Is this your verdict? Please write yes or no and sign your name.

Counsel would you approach the bench?

(COLLOQUY AT THE BENCH)

THE COURT: The Court and counsel at the bench have looked over the polling and the Court feels that the polling is satisfied.

Do you have a motion by the State that the verdict of the jury be recorded by the clerk?

MR. LENTINI: Yes, Your Honor. The State so moves.

THE COURT: Granted.

We're going to take a short recess.

Ladies and Gentlemen I'm going to ask you to go into the jury room for a few moments and I'm going to ask you please do not talk with anyone on your way out and on your way back. In the jury room itself please do not discuss the case at all, what's already happened or what's about to happen. Do not discuss any of the legal concepts or principles or anything and then I'll get back to you in a few minutes after I have a meeting with the attorneys before we can decide what we're going to do.

Thank you very much. You can go into the jury room.

(WHEREUPON THE JURY EXITS THE COURT-ROOM)

THE COURT: Mister Capitelli you have a motion?

MR. CAPITELLI: Yes, Your Honor.

Realizing that the verdict of first degree murder requires a sentencing phase on the three counts which were returned on behalf of Mister Lowenfield I request a twenty-four to forty-eight hour delay for purposes to give them time to cool, the jury to cool from the verdict and also in preparation.

MR. LENTINI: Your Honor, the State would object to that request because they've had time to prepare for this eventuality and the State is ready to proceed within an hour.

THE COURT: I'd like to state for the record that I talked with the jurors for a moment to see what their mental and physical state was. Last night, as you recall, at eight o'clock they said that they were ready to eat and they were ready to retire. In other words, they knew what they, know they felt last night and I wanted to go see whether they would be physically and mentally could continue on and in talking with them it was unanimous that they were, that they felt okay, physically, mentally and that they didn't need time to rest. So I have that at my, in my knowledge, also.

Your motion is denied.

MR. CAPITELLI: Respectfully note my objection.

THE COURT: Yes, sir.

I'm going to ask—do you want the courtroom cleared now?

MR. CAPITELLI: Yes.

THE COURT: —that the courtroom be cleared as soon as I get off the bench so that counsel can confer with their client just right in here but also, so that nothing that is said will be heard by anyone else.

Officer would you approach the bench?

(COLLOQUY AT THE BENCH)

(RECESS)

MR. CAPITELLI: Your Honor, at this time out of the presence of the jury I wish to take a note of evidence from Mister Lowenfield and ask that he be sworn in, please, Your Honor.

THE COURT: Please swear him in.

LESLIE LOWENFIELD, I'm housed at Orleans Parish, New Orleans, Louisiana, was called as a witness, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPITELLI:

Q Mister Lowenfield you realize that shortly they will be having a sentencing hearing based on the three counts that were returned on first degree murder and in connection with that hearing is it accurate to say that you've instructed me not to put on any psychiatric evidence concerning yourself?

A That's correct.

Q That is your desire and instruction to me.

A Yes, sir.

Q And you also do not wish to testify at this hearing as indicated to me previously.

A Under the circumstances of the hearing, I mean, I wish for thoughts concerning the rephrase the sentence, the hearing if I, if there is anything I have to testify, I will (sic).

MR. CAPITELLI: Let me consult with my client on that point, Your Honor.

THE COURT: Yes.

BY MR. CAPITELLI:

Q As previously stated it is not your desire to testify at this point; is that accurate?

A Yes, sir.

MR. CAPITELLI: No further questions.

THE COURT: Any questions, Mister Lentini?

MR. LENTINI: No questions, Your Honor.

THE COURT: You can step down.

MR. CAPITELLI: Also, Your Honor, let's clarify outside of the presence of the jury. We had discussions with the State prosecutors in this matter and we will be entering the stipulation that the conviction, and the conviction they will enter from Canada will be Leslie Lowenfield was on trial here. He's one and the same individual. We will object to the admissability of the conviction itself. The stipulation will deal with the fact that he is the same individual but we'll object to the admissability. Additionally, we would either stipulate with the State that Mister Lowenfield is the same individual that was booked on violations of R.S. Fourteen, two eighty-five, telephone communications. He subsequently resolved it in a filing of a Bill of Information by the district attorney's office, Case Number Eighty-Two dash Thirty-two sixty five. and again we'd object to the admissibility of the Bill of Information in the matter on the grounds that they should be required to prove the defense itself.

THE COURT: Relative to the two stipulations counsel, Mister Lentini you agree to that?

MR. LENTINI: Yes, Your Honor.

MR. GREMILLION: Your Honor, I understand there's one other stipulation and that's in the aggravated circumstances Section B, the offender, it's been amended to the offender has significant prior history of criminal activity. Since the words, murder, aggravated rape, or aggravated kidnapping do not appear and are not applicable to this situation it is my understanding that both counsel for the State and for the defense have agreed to amend it to the offender has a significant prior history of criminal activity.

MR. CAPITELLI: And to strike all the other words, yes, not apply—

THE COURT: Yes.

Counsel I have shown you each a copy of the general jury instructions for the penalty phase which I intend to instruct the jury on.

Any objection to that?

MR. CAPITELLI: None by the defense.

MR. LENTINI: The State has no objections.

THE COURT: I don't have the verdict forms ready yet but when they are ready I'll let you see them and I'll ask you whether there are any objections to that when I get that.

In addition to that I have prepared a listing of mitigating circumstances, A through H and a listing of aggravating circumstances A, B, and C, and I have shown that to both counsel. Do either counsel have any objection to what I proposed to give to the jury as far as aggravating and mitigating circumstances?

MR. CAPITELLI: Not by the defense.

MR. LENTINI: The State has no objection.

THE COURT: Any other matters before the jury comes back?

MR. LENTINI: No, Your Honor.

MR. CAPITELLI: None.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury or do you wish to poll the jury?

MR. GREMILLION: The State waives the polling.

MR. CAPITELLI: I waive the polling.

THE COURT: Counsel approach the bench.

(COLLOQUY AT THE BENCH)

THE COURT: Ladies and gentlemen this is the phase of the trial, the sentencing hearing.

The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that shall be imposed upon the defendant. You now have the duty to recommend to count one, three, and four, of the indictment whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole, or suspension of sentence. In recommending the sentence to be imposed

you should consider the circumstances of the offense and the character and the propensities of the defendant. At the conclusion of this hearing I will instruct in detail to what the law requires in deciding which sentence is to be imposed.

Go ahead.

MR. LENTINI: Ladies and gentlemen obviously over the past three or four days you have heard most of the evidence in this case. When I say most of the evidence the State did not produce certain evidence during the guilty phase which will be produced during the penalty phase so that you can consider this evidence in arriving at your recommendation to the Judge.

The first thing the State is going to do is reintroduce all of the physical evidence, testimony, and stipulations that were introduced during the guilt phase of the trial and you will have an opportunity if you so wish to review that evidence again. Now we're not going to waive gruesome pictures at you and you saw those pictures. You have an opportunity to see that and any other evidence that you want to see to make your determination.

The other evidence that the State will produce will reflect upon the character and propensities of the defendant.

In order to consider and recommend the death penalty in this case the State must produce aggravating circumstances which are detailed in the statute. Now the aggravating circumstances that the State is relying upon in this case are; one, that the offender has a significant prior history of criminal activity.

Two, that the offender knowingly created a risk of death or great bodily harm to more than one person. Now you will notice that is also an element of first degree murder statute that you have already found to be the case.

And three, that the victim was a witness in a prosecution against the defendant and gave material—gave material assistance to the State in an investigation or

prosecution of the defendant or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material against the defendant. I'm going to produce a certified copy in the official court record reflecting the Bill of Information being filed against the defendant alleging that on August twenty-fourth, nineteen eighty-two the defendant violated R.S. Fourteen Two Eighty-five by willfully instituting telephone calls to Sheila Thomas and therein making threats to kill Sheila Thomas with the intent to coerce, intimidate, or harass said person.

The State will not produce any more witnesses to you or give testimony from the stand. We will introduce another document which will reflect upon the character of the defendant.

MR. CAPITELLI: One moment, Your Honor.

THE COURT: Yes.

MR. CAPITELLI: We waive the opening statement.

THE COURT: Thank you.

Proceed.

MR. LENTINI: Your Honor, that State wants to call Special Agent Mere. Your Honor, the State intends at this time to introduce a document which we will mark State Penalty Hearing, Exhibit Number One, which is a certified copy of a certificate of conviction from the Providence of Ontario, City of Toronto and the Commonwealth of Canada and we're prepared to call witnesses in absence of the stipulation, the document, the authenticity of the document and to the identity of the person who was so convicted in Canada.

MR. CAPITELLI: Your Honor, we will enter into the stipulation that as to the authenticity of the document and as to the individual being the same individual that was on trial but we object to the admissability of the document on the grounds of the, which the State previously—which the Court is aware of.

THE COURT: Are you offering that at this time?

MR. LENTINI: Your Honor, so at this time the State offers the Canadian conviction for attempted rape and I have copies I would like—

MR. CAPITELLI: May we approach the side bar for one moment?

THE COURT: Yes.

(WHEREUPON DISCUSSION WAS HELD OUTSIDE THE PRESENCE OF THE JURY)

MR. CAPITELLI: Judge, I want to clarify it. I did this because the original that was introduced is not going to be shown to the jury and the copy is altered because the portion count, 2 A is eradicated. That is both agreed with the defense counsel that we preferred it going in that way.

MR. LENTINI: Just for the record we'll introduce a copy of the copy the jury is going to see which does not contain count two which is a weapons charge and subsequently reversed by the Supreme Court in Canada. That has been removed from the copy and I'll offer it as a state penalty hearing exhibit. One A.

MR. CAPITELLI: And just again to clarify admissability on the grounds it being a former decision and other grounds.

THE COURT: Do you want to put any other details of your objection into the record?

MR. CAPITELLI: It is—I'm uncertain whether all of the constitutional provisions and protections under the United States Constitution were provided to Mister Lowenfield in the Canada conviction and, therefore, that is the real thrust of my argument that the conviction should not be admitted.

THE COURT: The conviction is over ruled.

MR. CAPITELLI: Note my objection.

MR. LENTINI: The State will also introduce State Penalty Hearing—

THE COURT: One minute. The other ducment. Let it be received into evidence.

Go ahead.

MR. LENTINI: The State will also introduce State Penalty Hearing Exhibit Number Two which consists of a certified copy of criminal court record eighty-two thirty-two sixty-five for the Twenty-Fourth Judicial District Court which is the Bill of Information charging harassing phone calls on August twenty-fourth, nineteen eighty-two and I understand that the defense joins in the stipulation that the person so charged under this Bill of Information is the defendant, Leslie Lowenfield.

MR. CAPITELLI: Your Honor, we so stipulate and again note an objection as to the admissability of this document.

THE COURT: Yes. Let it be received into evidence.

MR. LENTINI: The State will also offer, file, and introduce all of the stipulations, testimony, and exhibits which are entered into the guilt phase of the trial.

MR. CAPITELLI: And I would request that all of my previous objections to said evidence be noted again for this phase for my client's rights to be totally protected for that.

THE COURT: Yes.

Let it be received into evidence.

MR. LENTINI: Your Honor, with the Court's permission I would like to provide the jury with copies of the Canadian conviction and, also, let them review the true copy of the pending Bill of Information and, also, the letters, the original letters and, well, State's Exhibit Ninety One, One Zero Nine, Eighty Four, Eighty Six, Eighty Five, and Ninety Two. I'd like the jury to have an opportunity to view this if they so wish.

MR. CAPITELLI: Your Honor, I request that we approach side bar for one point.

THE COURT: Yes.

(WHEREUPON DISCUSSION WAS HELD OUTSIDE THE HEARING OF THE JURY)

MR. CAPITELLI: I'm going to object specifically to the admissability of the original uncensored, unedited, letter and note pad on the following grounds;

One, in the trial these documents are scrubbiously (phonetic) edited as being read to the jury and not introduced. I think at this point the objection to them being admitted is for that same reason editing wasn't done. Now and in particular I would like to note I believe there were references to arrests in those letters and notebook which do not apply to the single arrest on August twenty-fourth, for the harassing phone calls as mentioned by the State in the original statement and, also, to the arrest which the defense has not been notified of as constituting aggravating circumstances in the offense and I object to them being shown to the jury.

MR. LENTINI: Your Honor, the State's response is that the writing reflects the character and propensities of the defendant were written in his own hand and sent voluntarily to the individual. He has no rights to expect that information would not come forward in the penalty phase as it is not information that has been supplied by the State or any, on the grounds of the State.

THE COURT: Objection overruled.

Your request is granted Mister Lentini.

MR. CAPITELLI: Please note my objection.

MR. LENTINI: Your Honor, the State has no further evidence to present on the penalty phase. The State will rest.

THE COURT: Okay.

Counsel in the meantime I've gotten back the verdict forms and I think I have shown it to counsel. Anybody have an objection to the verdict form proposed by the Court?

MR. LENTINI: The State has no objection.

MR. CAPITELLI: No, Your Honor.

THE COURT: Go ahead Mister Capitelli.

MR. CAPITELLI: Your Honor, we submitted the exhibits that were offered in the first portion, in the trial portion.

THE COURT: Any objection?

MR. LENTINI: No objection.

THE COURT: Let it be received into evidence.

MR. CAPITELLI: Based on that we rest.

THE COURT: Thank you.

Ladies and gentlemen we're going to have closing arguments by the State, then the defense, and the State then I'm going to give you the jury instructions and then I will order you to go into the jury room and deliberate and arrive at a verdict.

We'll begin with the closing arguments by the State. Mister Gremillion.

MR. GREMILLION: Thank you, Your Honor.

Ladies and gentlemen during this stage of the proceedings the State has the burden to prove one or more aggravating circumstances for the consideration of the death penalty, just giving you evidence to look at, view. We've produced for you and ask you to look at three aggravating circumstances.

First of all, one of the aggravating circumstances is the victim was a witness in a prosecution against the defendant, gave material assistance to the State and any investigation or prosecution of the defendant or was an eye witness to a crime alleged to have been committed by the defendant or possess other material evidence against the defendant.

We've introduced State Two which shows that six days before these murders occurred the defendant threatened and violated R.S. Fourteen Two Eighty-five by willfully instituting a telephone call to Sheila Thomas and therein making threats to kill Sheila Thomas with the intent to coerce, intimidate, and harass that person. This is not a conviction. It shows that Sheila Thomas would have been part of that investigation and a victim.

Secondly, the State has introduced a document from Canada. It's a certificate of conviction when the defendant, Leslie Lowenfield, was convicted of attempted rape in Canada back in nineteen seventy-four. It shows the compensity to commit crimes and his significant record. That is another aggravating circumstance.

Thirdly, you have already convicted him of three counts for first degree murder.

Third and last aggravating circumstance we've given you is the offender knowingly created a risk of death and great bodily harm to more than one person. Your verdict found that. You need to reconsider that.

When we began this trial Mister Lentini and I asked each juror and received a commitment from each and everyone of you during voir dire and we were asking you questions that you could and would reconsider the imposition of the death penalty. We ask that you look at it under each circumstance and the facts of each case.

Now ladies and gentlemen this case is in your hands and I ask you to consider the penalty of death.

Thank you.

THE COURT: Thank you.

Mister Capitelli.

MR. CAPITELLI: Ladies and Gentlemen I wish to thank you for your attentiveness during the sentencing phase and also thank you for not rushing to judgment which you didn't do and I know you didn't do. And I know that you suffered and struggled during the decision making portion as you did, as you promised you would under your oath.

The only thing I ask now is that you are able to listen to me with an open mind and an open heart and consider the alternative as you told me you could consider the alternative for whatever reasons you feel are justified, your own moral or religious beliefs or whatever reasons you feel are justified and render a life sentence in this case.

I'd like to address a couple of points briefly. First of all, this is not a conviction; this is an arrest for a harassing phone call. If you looked on the back the charge isn't even filed until October, a month and a half after this incident. I don't believe anyone truly believes that the reason for this, you know, as the jury found your verdict, I'm not questioning the verdict, that the reason for

this was the harassing phone call that she was a witness on. I don't think anyone believes that. I don't think that adds anything to your consideration. This conviction from Canada is attempted rape, it's in Canada. It's for a two year sentence. Mr. Lentini and Mr. Gremillion had the chance to question Mr. Lowenfield on the stand about that. They chose not to. But I don't think that enters into your decision either. The decision is what you had before you, that's the case. The case is what you had the first time and you know the facts. I'm not going to go into great detail with the facts. I do feel that you did not, as I stated, rush to judgment. You did not—you looked at the evidence and I know, I know that you had some concern, some doubts. I know those of you who had expressed the doubts just by the nature of this case I have to feel that you had doubts. Maybe in your minds those doubts did not reach the level of a reasonable doubt but any doubt would be significant enough for each of you to consider not coming with the death penalty. That you will have to look whatever time from now and know when this execution is rendered that your decision had a doubt with it. You went for thirteen hours and obviously there were significant things that you discussed, the things in your heart because I know each of you took this so seriously in your heart you had trouble with it.

MR. LENTINI: Excuse me, Your Honor, I'm sorry but, Your Honor, I have to make an objection at this point. I think that the only thing that is relevant at this stage is not a comment on the evidence of the guilt points but only mitigating circumstances which would have a bearing on the penalty, possible penalty, that the jury would recommend. I think Mister Capitelli is commenting on the quality of evidence. The jury has already decided that.

MR. CAPITELLI: Your Honor, I think anything that is introduced, introduced all the evidence back in this case, they introduced the whole, all their exhibits be

reconsidered again, all the arguments be reconsidered again.

THE COURT: Overruled.

MR. CAPITELLI: Thank you, Your Honor.

I think you did have doubts. I think that you were not satisfied. I know no one could be satisfied with the police work that was done in this case. I don't think anyone of you wants to give a stamp of approval of that type of work. I know you struggled because of that and had to overcome that and you don't want a stamp of approval on that so that other juries may have to suffer with the same type of problems in a case.

Each of your verdicts here is important. Each one of you is entitled to hold and I ask you if there is only one, if there's only one person here that feels that the death penalty is not, I hope there are more, but if there's only one that you hang to your convictions as you're entitled to do.

The Judge is going to read you about in the charge that you not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or the mere purpose of returning a verdict. If you are unable to unanimously agree on a verdict the recommendation of the Court will enter a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence. So if one of you feels those doubts are significant to you, maybe not to other jurors, to you, I ask you to cling to that and you're entitled to cling to that belief and cling to your opinion. Each one of you is entitled to do that.

This isn't very easy for an attorney to get up here and argue to save someone's life. It's a very difficult thing. You wonder whether the Lord is going to give you the words that are enough to convince for all the people sitting here that you can't converse with that you can just look at and try to feel, to try to come up with something why they—why they feel that there should be consideration given. You look at the morality of this—

of the death sentence. Each of you I asked about religions. I know we have Mormons, Lutherans, I think, Episcopalians, a number of Catholics, majority are on the jury and each of you I asked your religious beliefs because when it came down to this I wanted to be able to talk to people who I felt had religious convictions and thought deeply about matters like this. And I know each of you truly does.

What is the death penalty for? Is it a deterrent? If you come back with life he's going to be sentenced to three life sentences without benefit of parole, probation, or suspension of sentences and the possibility of twenty-one years on each of the other two manslaughter counts. Is that any more of a deterrent? Is it retribution? Is it to say now that vengeance, hatred, that we should spill out and kill more, have retribution for what was done? If you could bring back any of those people maybe you would say yes but it can't do that. I wish to God it could but it can't. We can't bring any of them back no matter what happens. And is more death and more hatred going to count? I don't think so. I don't think that each of you in your heart feels that that is something that—that you should do. I hope—I hope I'm right about it. In going over this when I first got appointed to this case I said what if it comes to this, what if it comes to this stage. What do you say—what do you say to jurors and at one point the best example I can give and my religion is Catholic as some of you are on the jury and I can only relate to my own religion as best and I came home one day and I saw a magazine article and the magazine article, the cover of the magazine article said why forgive. And it had the Pope forgiving the assassin that had tried to kill him. And my first reaction was, well, why should he do that and I walked off and left it. And then several days later I looked at it again and read the article and I said why should he forgive. Because your initial reaction of hatred and vengeance and to strike back although it's a human

trait is the wrong thing. We're not the ultimate judges of anything. It's the wrong thing to do. And then several days later when I looked at it and I read it again I said why forgive, that is the right thing to do.

I ask for his life.

MR. LENTINI: Ladies and gentlemen I'm going to be very brief because I know you've heard a lot this past week.

I have do doubt of the sincerity of the abled defense attorneys for this defendant. I'm going to tell you I do not think that it is my place or his place to tell you what to do concerning the penalty of this case. It's very easy for someone on the outside who has not taken the oath that you have taken to say, well, this is what I would do. This is what I think is the proper thing. It's very easy to—You have a very difficult decision to make.

There are two things you can do. You can avoid it and I don't think anybody would blame you. The way to avoid is simply not to consider the death penalty, simply not do the thing that you told us you would do after you were sworn and during the jury selection phase and nobody would blame you for that because it is a difficult decision and those decisions are very tough for you to face. I'm not asking you to do one or the other. I'm simply asking you to consider it, consider both and decide within your own heart and mind what is appropriate. We can talk about religion and you can find examples of forgiveness and you can find examples that say that there are certain penalties that are appropriate for certain crimes. The penalty that you recommend—the penalty that you recommend has nothing to do with any forgiveness that anyone has to give for this man. That is between him and a higher authority.

I just ask you to consider the appropriate penalty for one who snuffs out the lives of five human beings. Consider the appropriate penalty in your own hearts for one who not only has taken five lives but someone who has taken and killed a part of so many other people.

None of us walk the face of this earth without affecting other people, relatives, friends, co-workers, all of those people have been part of them that has been killed in addition to the victims.

And what is the appropriate penalty for one who does that? Does society have a right to say there are some crimes—there are some crimes that demand the ultimate penalty? That's something you have to decide. It's very easy for me to tell you what I would do. I'm not in a position. I'm simply asking you to consider it. Consider both for every decision that you arrive at. No one will be able to quarrel with you because you have been an exemplary jury. You have been attentive. You have gone through a lot and you have considered this case very carefully. And I just ask you to do that a little bit longer. Consider the appropriate penalty.

Thank you.

THE COURT: Ladies and gentlemen you must now determine relative to counts one, three, and four of the indictment whether the defendant should be sentenced to death or life imprisonment without benefit of probation, parole, or suspension of sentence. You must consider the circumstances of each offense and the character and propensities of the defendant in determining the sentence to be imposed. When the attorneys on both sides stipulate as to the existence of a fact the jury must regard that fact as proven.

In reaching your decision regarding a sentence to be imposed you must be guided by these instructions. Relative to counts one, three, and four of the indictment you will require to consider the existence of the aggravating and mitigating circumstances in deciding which sentence should be imposed. That statutory aggravating circumstances are:

(A) The offender has a significant prior history of criminal activity;

(B) The offender knowingly created a risk of death or great bodily harm to more than one person;

(C) The victim was a witness in a prosecution against the defendant, gave material assistance to the State in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

You will be furnished with a list of the statutory aggravating and mitigating circumstances which you may take with you during the deliberations. Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed you may consider imposing a sentence of death. If, however, you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed then life imprisonment without benefit of probation, parole, or suspension of sentence is the only sentence that may be imposed. Even if you find the existence of the aggravating circumstance you must also consider any mitigating circumstances relative to counts, one, three, and four of the indictment before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. They are:

(A) The offender has no significant prior history of criminal activity;

(B) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(C) The offense was committed while the offender was under the influence or under the domination of another person;

(D) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(E) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or

to conform his conduct to the requirements of law was impaired as a result of a mental disease or defect or intoxication;

(F) The youth of the offender at the time of the offense;

(G) The offender was a principal whose participation was relatively minor;

(H) Any other relevant mitigating circumstance.

However, in addition to those specifically provided mitigating circumstances you may also consider any other relevant mitigating circumstance. You are limited only to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed. The fact that you are given a list of aggravating and mitigating circumstances should not cause you to infer that the Court believes that any other circumstances do or do not exist. The law requires that the jury be given such a list in every case. Whether any aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented.

In addition to the evidence presented at this sentencing hearing in deciding the sentence to be imposed you may consider evidence presented during the guilt determination trial.

I will ask the clerk to hand the jury six blank forms of verdicts. The first three verdict forms relate to counts one, three, and four and read:

Having found the below listed statutory aggravating circumstance or circumstances and after consideration of mitigating circumstances offered the jury recommends that the defendant be sentenced to death.

In the event you unanimously decide the death penalty should be imposed a space is provided to write the statutory aggravating circumstance or circumstances that you unanimously find to exist. The foreman must sign the form.

The second of these forms of verdicts relate to count one, three, and four and read:

The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. If the jury decides that a life sentence without benefit of probation, parole, or suspension of sentence should be imposed the foreman need only sign that form of verdict. No listing of aggravating or mitigating circumstances is required.

Nothing said or furnished you in these instructions should be taken as a opinion of the Court as to the existence or not of statutory aggravating or mitigating circumstances or as an opinion concerning the appropriate sentence to impose. It is your responsibility in accordance with the principles of law I have instructed to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation, parole, or suspension of sentence. The Court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation the Court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

When you enter the jury room it is your duty to consult with one another to consider each others views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment. Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to re-exam your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Members of the Jury you will now retire to consider your verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Ladies and gentlemen there's no verdict yet. They have a couple of questions.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: The State waives a polling.

THE COURT: Mister Conzaneri are these two questions or two paragraphs that you submitted to the Court?

MR. CONZANERI: Yes, sir.

THE COURT: Judge Cannella please clarify the word recommends on both verdicts sheets. Does this mean that the Court will have the option to follow the recommendation or is the Court bound to follow the recommendation on both.

The Court is bound to follow the recommendation on both.

If an unanimous decision on either verdict cannot be reached is the defendant automatically sentenced to life imprisonment?

The defendant is automatically sentenced to life imprisonment without benefit of pardon, parole, or suspension of sentence. The answer to the second one is yes.

You can retire to the jury room.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Ladies and gentlemen they have not reached a verdict yet so please do not make any comments whatsoever when they're in court.

Please bring them back.

Counsel do you waive a polling of the jury?

MR. LENTINI: Waive a polling, Your Honor.

MR. CAPITELLI: Yes, Your Honor.

THE COURT: Mister Canzoneri is the note that wrote?

MR. CANZONERI: Yes; it is.

THE COURT: I've read the note and discussed it with counsel and I'm going to grant your request. Is there any way you could continue deliberating tonight and arrive at a verdict?

MR. CANZONERI: I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired. I just—we as a unit felt that we could better continue after resting.

THE COURT: I'm going to grant your request.

I'd like to remind you, please, on your way out tonight and on your way back tomorrow please do not talk with any attorneys, investigators, defendant, or witnesses in the case. Please do not discuss the case among yourselves yet from now until you come back into the jury room tomorrow. Please remember what you have seen and what you have heard and have a good night's sleep. We'll start tomorrow morning at nine-thirty.

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

[Title Omitted in Printing]

Testimony and proceedings taken in the above numbered and entitled cause for purpose of trial on Wednesday, May 16, 1984, before the Honorable James L. Cannella, Judge presiding.

PROCEEDINGS

THE COURT: Please call them back in.

(WHEREUPON JURORS ENTER THE COURTROOM)

Good morning, Ladies and gentlemen. You all look a lot better now than you did last night.

Would you please answer here or present.

Richard Velleman.

MR. VELLEMAN: Here.

THE COURT: Marc Addison.

MR. ADDISON: Here.

THE COURT: Frank Weiland.

MR. WEILAND: Here.

THE COURT: Patricia Olson.

MS. OLSON: Here.

THE COURT: Catherine Robert.

MS. ROBERT: Here.

THE COURT: Betty Pugh.

MS. PUGH: Here.

THE COURT: Anthony Conzoneri.

MR. CONZONERI: Here.

THE COURT: EUGENE ROBINSON.
MR. ROBINSON: Here.
THE COURT: Raphael Asavedo.
MR. ASAVEDO: Present.
THE COURT: Catherine Grote.
MS. GROTE: Here.
THE COURT: Gerald Holland.
MR. HOLLAND: Here.
THE COURT: Sandra Woodie.
MS. WODDIE: Here.
THE COURT: Last night when we recessed for the evening I told you to not discuss the case anymore among yourselves until you came back today. I now remove that restriction and I order you to retire to the jury room to consider your verdict.

(WHEREUPON JURORS EXIT COURTROOM TO DELIBERATE)

(RECESS)

(RECESS OVER)

THE COURT: Mr. Capitelli, you have a motion?
MR. CAPITELLI: Yes, Your Honor.
Please note the jury is not present and this motion is taken outside the presence of the jury.
On behalf of Mr. Lowenfield I will make a formal motion to the Court to declare the Sentencing Phase at this time a Mistrial or Hung Jury and that the jury be dismissed.
The reasons I will state as follows:

The jury has been out today, Wednesday the Sixteenth of May over—well over two hours. Last night well over three and a half hours and again was sequestered last night. after deliberating in excess of thirteen hours on the Guilt Phase.
The length of time is such that it compels me to move for this mistrial, request for a mistrial.

Additionally, I would note that the last instruction by Judge Cannella on the Guilt Phase was a strong instruction that I objected to and I feel that it may have had a residual effect on the Sentencing Phase and I'd like to move for a mistrial at this time.

MR. LENTINI: Your Honor, I don't think that there is any indication from the jury that they are unable to reach a verdict. I think the indication has been that they are carefully considering what their recommendation would be and I believe that Mr. Capitelli's requested several times that they not rush to judgment, that they carefully consider it. Until we get come sign that they are hopelessly deadlocked and not making any progress I think we should let them deliberate.

THE COURT: This jury has shown a propensity to— It has taken my instructions as far as writing notes and letting me know by the questions that they asked and the comments they had; so, they have shown that they are not going to hesitate to say something if they are stuck or for any reason and they have come forth with those questions or comments during the penalty phase.

So, I'm satisfied that they are still working towards the verdict, until they tell me something different.

Your motion is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Yes.

Court will be in recess

(RECESS)

(3:05 PM)

MR. CAPITELLI: May it please the Court, Your Honor, I'd like to note first that the jury is not present and the Defendant, Mr. Lowenfield, is present.

Your Honor, it is my intention to reurge my motion that the mistrial be declared because that the jury is hopelessly hung and that is based on the time frame and my observations of the jury which I feel is in ob-

vious distress since requesting that the Court convene for the purpose of that motion; the Court has received a note from the jury which I wish to be made part of this particular motion and in which I think substantiates my observations and feelings about the need to declare a mistrial at this point, Your Honor.

THE COURT: Mr. Lentini.

MR. LENTINI: Yes, Your Honor.

The note indicates that the jury would like to be brought back into Court. It has a question. I think under the circumstances it would be premature to rule on the motion Mr. Capitelli raises until we abide by the request of the jury.

I would also like to note that in Chambers we agreed on a procedure that would be employed in questioning this jury as to whether or not they are deadlocked and I ask for a stipulation from Mr. Capitelli that the procedure to be followed will be that the Judge will read the last sentence of the instructions that were given on the Penalty Phase to the jury and we'll ask if they have reached a verdict on any of the Counts and if not we'll ask the Foreman to give if there is any possibility that further deliberation will be beneficial and each juror will have a piece of paper on which they can write their opinion concerning the advisability of further deliberation.

Is that a correct statement, Mr. Capitelli?

MR. CAPITELLI: Your Honor, Mr. Lentini is accurate in what I stated would be agreeable as a stipulation but I'd want a ruling first on my motion which preceeded the note which states that the jury is having great distress and is unable to reach a decision at this point. There is great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and oath it took. Signed the Foreman. I think that note in itself in connection with the time involved and I think the distress that they've gone through

enough should be sufficient for the Court to grant a mistrial in this matter.

THE COURT: Motion is denied.

Approach the bench, Please, Counsel.

MR. CAPITELLI: Please mark the note as Defense Exhibit One.

MR. LENTINI: Your Honor, as far as using the note and marking it on his motion, Mr. Capitelli states that his motion preceeded the note and I don't think the note should be entered in connection with his motion.

The note is requesting that the jury come back in and be further instructed by the Judge.

MR. CAPITELLI: I make the request that the note be incorporated with my motion since the note came to light in the course of us preparing to come back into Court and hear my motion and I ask that it be incorporated with my request.

THE COURT: Your request is granted.

Let it be received in evidence.

Any other motion before the jury comes back in?

MR. CAPITELLI: No, Your Honor.

MR. LENTINI: None from the State.

(WHEREUPON JURORS ENTER COURTROOM)

THE COURT: Counsel, do you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: State waives the polling.

THE COURT: Mr. Conzoneri, is that the note you recently handed the Bailiff?

THE FOREMAN: Yes; it is.

THE COURT: Mr. Conzoneri, I'd like you to answer the question that I have and I'd like you to only answer it yes or no: Does the jury have a verdict on any Count?

THE FOREMAN: No, sir.

THE COURT: Ladies and Gentlemen as I instructed you earlier if the jury is unable to unanimously agree

on a recommendation the Court shall impose a sentence of Life Imprisonment without benefit of Probation, Parole or Suspension of Sentence.

The procedure I'm going to go through is I'm going to aska question and I'm going to ask Mr. Conzoneri to please give me the anser to the question. Then I'm going to pass out pieces of paper to each juror, and I'm going to ask them to write their nam on the piece of paper and write your individual answer to the question on the paper. Then we'll pick that up.

The question is: I ask you if further deliberations would be helpful in obtaining a verdict.

Mr. Conzoneri, could you please answer that question.

THE FOREMAN: Yes, sir.

THE COURT: Please pass out the papers.

On those pieces of papers if you would please put down your named down and then if you please answer that same question: If further deliberations would be helpful in obtaining a verdict? What is your answer to the question?

MR. CAPITELLI: May I approach the bench, Your Honor.

(COLLOQUY AT BENCH)

THE COURT: Ladies and gentlemen, I'm going to ask you to step into the jury room, please for a minute.

(WHEREUPON JURORS EXIT COURTROOM)

MR. CAPITELLI: Your Honor, may it please the Court, at this time, based on the answers from the jurors that fully Four of them are unable to feel that any further deliberation would be of any value, I reurge my motion for the Court to declare a mistrial and offer, introduce all Twelve slips of the jurors as a Motion Defense Motion Number Two in globo, all Twelve of the slips of paper in supprt of that request.

THE COURT: Any objection to the introduction to the slips, Mr. Lentini?

MR. LENTINI: No objection.

THE COURT: Let them be received in evidence.

What is your position relative to the request for a mistrial?

MR. LENTINI: State would oppose it, Your Honor.

THE COURT: This is the first time that the jury has requested or has stated that they are having trouble arriving at a decision relative to the Penalty Phase.

The Motion is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Yes.

I've told Counsel what I propose to say to the jury when I bring them back in.

Any objection, Mr. Lentini?

MR. LENTINI: No objection.

THE COURT: Any objection, Mr. Capitelli?

MR. CAPITELLI: No objection to what the Court is going to state to the jury but I make a special request that the Court specifically state to the jury that there is no obligation under the Law that they reach a verdict.

THE COURT: Your request is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Please call them back in.

(WHEREUPON JURORS ENTER COURTROOM)

THE COURT: Mr. Conzoneri, did you write this note?

THE FOREMAN: Yes; I did.

THE COURT: I'm going to ask the question again. I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.

The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?

I'll repeat that: Do you feel that any further deliberations will enable you to arrive at a verdict?

Please put your name and yes or no.

(COLLOQUY AT BENCH)

THE COURT: Ladies and Gentlemen, I didn't ask for a polling. DO you all waive a polling?

MR. LENTINI: Yes. State waives the polling.

MR. CAPITELLI: Yes.

THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.

When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.

Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Ladies and Gentlemen please retire to the jury room.

(WHEREUPON JURORS EXIT COURTROOM)

MR. LENTINI: State would request that the last polling which indicated Eleven to One vote, Eleven votes indicating further deliberation would be of benefit in arriving at a verdict and One vote indicating the negative. The State would ask that those sheets be entered into the record.

MR. CAPITELLI: No objection.

THE COURT: Let them be received in evidence.

Counsel, approach the bench please.

(COLLOQUY AT BENCH)

(RECESS)

THE COURT: Please file this into the record.

(RECESS)

THE COURT: Any motion before the jury comes back?

MR. LENTINI: None from the State, Your Honor.

MR. CAPITELLI: None.

THE COURT: Please call them back.

(WHEREUPON JURORS ENTER THE COURT-ROOM)

THE COURT: Counsel, do you waive a polling of the jury?

MR. LENTINI: State waives a polling.

MR. CAPITELLI: Yes, Your Honor.

THE COURT: Ladies and Gentlemen, have you arrived at a verdict?

THE FOREMAN: Yes; we have.

THE COURT: Would you please hand it to the Clerk.

Verdict: Count One, Sheila Thomas. Having found the below listed statutory aggravating circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to death. Aggravated circumstances or circumstances found The Offender knowingly created a risk of death or great bodily harm to more than one person. The victim was a witness in a prosecution against the Defendant and gave material assistance to the state in any investigation of the Defendant.

Gretna, Louisiana the Sixteenth Day of May Nineteen Eighty Four signed Anthony S. Conzoneri, Foreman.

Verdict: Count Three, Carl Osborne. Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to Death. Aggravating circumstance or circumstances found: The Offender knowingly

created a risk of great bodily harm to more than one person.

Gretna, Louisiana the Sixteenth day of May Nineteen Eighty Four, Anthony S. Conzoneri, Foreman.

Count Four, Myrtle Griffin. Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to Death. Aggravating circumstance or circumstances found: The Offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana the Sixteenth day of May Nineteen Eighty Four, Anthony S. Conzoneri, Foreman.

MR. CAPITELLI: Request that the jurors be polled on each of the verdicts, Your Honor.

THE COURT: Yes.

On each sheet of paper if you could please put Count One and Count One is relative to Sheila Thomas. Is this your Verdict? Please write Yes or No. Then sign your name.

Count Three is relative to Carl Osborne. Please put COunt Three at the top of the piece of paper. Ladies and Gentlemen, is this your verdict? Please write Yes or No and then write your name.

Relative to COourt Four, Myrtle Griffin. Ladies and Gentlemen, is this your Verdict? Please write Yes or No and then your name.

I order the Verdict of the jury recorded by the clerk. Counsel, would you approach the bench, please.

(COLLOQUY AT BENCH)

THE COURT: Ladies and Gentlemen, I'd like to thank you very much for your participation in this jury. I was impressed throughout the ten days or so that you served as a juror with your attention, with your patience, with your listening to the testimony and like I said before

you've done everything that the Court has asked you to do and you've done everything I think the Law requires.

So, I thank you very much for serving as a juror. I'll be available for a few minutes after you are discharged in the jury room to talk with you if you'd like. So, and I also have a certificate that I'd like to give to you.

So, I'd ask everyone to wait in the jury room.

I'd like to mention to you as to what you say to people, you can it is totally in your discretion, who you tell what about the case. So, you have a right to talk about the case with people or you don't have to talk to anybody. It is totally up to you. I would just ask you to be very careful what you say and how you say it but thank you very much for serving as jurors.

I discharge you from your jury service

(END OF TRIAL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-5036

Section "M"

LESLIE LOWENFIELD

versus

C. PAUL PHELPS, *et al.*

Transcript of Evidentiary Hearing in the above-entitled matter, heard on Thursday, February 12, 1987, before the Honorable Peter Beer, District Judge presiding.

ARTHUR J. LENTINI, after having been first duly sworn in the cause, testified on his own oath as follows:

DIRECT EXAMINATION

BY MR. CREDO:

Q What is your occupation?
A I am an attorney.
Q How long have you been an attorney?
A Ten years.
Q Approximately how long have you worked for the District Attorney's Office in Jefferson Parish?
A I worked for the DA's office for nine years, no longer employed there at this time.
Q Approximately how many first degree murder cases have you had occasion to handle?
A I tried five.

Q One of those was Leslie Lowenfield?

A That's correct.

Q Who was your assistant or co-prosecutor in this case?

A Greg Gremillion.

Q Do you have any independent recollection of the pre-trial discovery and pre-trial motions and work that went into the Leslie Lowenfield case?

A Yes.

Q Did you have an opportunity to observe the defense counsel, Wayne Walker and Ralph Capitelli during that stage?

A Yes, I did.

Q During the trial of this matter, were you the prosecutor involved?

A Myself and Mr. Gremillion.

Q Were you present throughout that trial?

A Yes, I was.

Q Did you have an opportunity to observe defense counsel at the point both in the guilty/innocence phase and the sentencing phase?

A Yes.

Q Based on your observations, did you observe any identifiable lapses either physical or mental on the part of either Mr. Walker or Mr. Capitelli during the guilt and innocence or sentencing phase of that case?

A No, I did not.

MR. CREDO: No further questions.

THE COURT: Cross examine, if you wish.

CROSS EXAMINATION

BY MR. ROSS:

Q Prior to the trial did you have any way of observing what it was that Mr. Walker or Mr. Capitelli did in preparing for the case?

A Did I observe what they did? In preparing?

Q Yes.

A To the extent that we conferred on *Brady* material and discovery, things of that nature and what I heard at the hearing, there was testimony that he had interviewed their client at the Correctional Center and to that extent, yes.

Q You don't know, do you, what Mr. Walker and Mr. Capitelli did to prepare for the case, did you?

A Yes, I do. To the extent I know there were several sanity hearings held, upon their request and they came to us several times to ask if we had any other information that would be beneficial to them, along the lines of *Brady*. They came to us and asked to see all the exhibits and evidence and we went through that with them. To that extent, I saw them prepare the case.

Q You didn't have access to their files, did you?

A No.

Q You didn't have access to their investigation reports, did you?

A No.

Q You didn't talk to their investigator, did you?

A No.

Q You didn't know the extent to which they requested records concerning Mr. Lowenfield's past social and cultural history, did you?

A Records outside of what the District Attorney's office had?

Q Yes.

A No.

MR. ROSS: I have no further questions.

THE COURT: I have a few questions since you are here. Do you have an independent recollection of the procedure that you followed in the sentencing phase?

THE WITNESS: Yes. It's been a while as to specifics, I might be a little shaky. I think I do for purposes of this hearing, I think I have an independent recollection of what occurred then.

THE COURT: Would you just tell me what your order of proof was in the sentencing phase, if you recall it?

THE WITNESS: In the sentencing phase, as I recall it, the aggravating circumstances were that the intent to kill more than one person which we proved simply by reintroducing all the exhibits and testimony that was given in the guilt phase. One of the other aggravating circumstances was that one of the victims, Sheila Thomas, was a witness in a prosecution theory being she had made a police report of harassing phone calls against Mr. Lowenfield and in the sentencing phase we introduced a bill of information that was filed by the District Attorney's office which charged Mr. Lowenfield with that crime. We had not introduced that during the guilt phase. In addition, Mr. Lowenfield had a conviction for, I believe it was rape, out of Canada. We did not introduce that in the guilt phase. Mr. Lowenfield took the stand and I cross examined him and I did not ask him about that during the guilt phase. However in the penalty phase we introduced a certified copy of the conviction and I think there was a stipulation from counsel that Mr. Lowenfield was the same person mentioned in the certified copy and that was either an aggravating circumstance, his past criminal record. I don't recall if there were any other aggravating circumstances. I simply reintroduced all of the testimony, exhibits and evidence that had been introduced in the guilt phase and added to that the bill of information charging harassing phone calls and the Canadian conviction.

THE COURT: When you then addressed the jury with respect to the State's position as it had to do with the penalty phase of the trial, can you remember and if you can, would you tell me the order of your argument in terms of the reference back to that evidentiary submission that you made in the course of the penalty phase? In other words, when you argued the penalty that the

State sought, did you make reference to those additional bits of evidence that you just described for me?

THE WITNESS: Did I make reference to those in my argument?

THE COURT: I'm not so concerned about whether you made reference to them specifically but did you make reference to them as being reasons for the State's asking for the death penalty?

THE WITNESS: Well, Your Honor, first of all, I don't believe I asked them to come back with the death penalty. I don't know that in first degree murder cases, I suggested these are the aggravating circumstances that the literature says we must prove in order for them to consider them and I asked them to consider the penalty.

THE COURT: I don't mean to suggest that you did. I just meant in connection with your submission to the jury at the conclusion of the evidence gathering period in the penalty phase. How did you refer to these other things or in fact did you refer to these other things?

THE WITNESS: I'm sure I did. I don't recall specifically but if I followed my normal course in closing argument, I'm sure I did mention those. I don't remember specifically how or what I said.

THE COURT: Would you tell me what your comprehension is of the State's burden at the time that the penalty phase begins?

THE WITNESS: In other words, what the State has to prove in order for the jury to consider the death penalty?

THE COURT: Yes, what is your notion of the order of the State's proof in that respect?

THE WITNESS: That the State has to prove the aggravating circumstances that the Code of Criminal Procedure provides are necessary for the jury to consider, we have to prove that beyond a reasonable doubt.

THE COURT: From what you just told me that is pretty much your statement to the jury after you presented that order of proof to the best of your ability?

THE WITNESS: Yes, Your Honor.

THE COURT: Do you have any other questions based on my questions?

MR. CREDO: No, Your Honor.

THE COURT: Thank you very much. You are excused and I appreciate your coming.

MR. CREDO: I offer a stipulation to counsel that Greg Gremillion, the co-prosecutor, he is available but his testimony would do nothing more than corroborate the points of Mr. Lentini's testimony as far as his actual presence and participation in the trial and I offer a stipulation to counsel that if he testified he would simply say he was prosescutor and he was present during the trial.

MS. MARSHALL: We have no problem with that stipulation.

THE COURT: Let that stipulation be made part of the record.

MR. CREDO: We submit the matter based on that testimony, Your Honor.

THE COURT: Well, we'll meet tomorrow at 9 and proceed from there.

(Whereupon Court was in recess.)

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-5036

Section: M (1)

LESLIE LOWENFIELD, Prisoner No. DOC-106178

versus

C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA, *et al.*

[Filed Mar. 31, 1987]

MEMORANDUM DECISION

This matter is before the Court on motion of Petitioner, Leslie Lowenfield, for a writ of habeas corpus and stay of execution, pursuant to 28 USC § 2254. Petitioner claims that he is being detained unlawfully by respondent, Frank Blackburn, in his official capacity as warden of the Louisiana State Penitentiary at Angola, Louisiana. This detention is pursuant to judgment of conviction and sentence of death imposed by the 24th Judicial District Court of Jefferson Parish, Louisiana. Petitioner claims that this conviction and sentence were in violation of rights, privileges, and immunities guaranteed by the Constitution of the United States. For the following reasons, Petitioner's request for relief must be DENIED.

FACTS

The facts are set forth extensively by the Louisiana Supreme Court in *State v. Lowenfield*, 495 So.2d 1245 (La. 1985). They are recounted here as they relate to the issues raised.

Petitioner met Sheila Thomas, the "primary" victim, in July of 1981. At the time, she was working in the sheriff's department in Jefferson Parish, where her principal duty was to escort prisoners from the parish jail to the courthouse and return them back to that facility. In August of 1981 Sheila and her young daughter, victim Shantell Osborne, moved in with Petitioner. The relationship deteriorated into one of acrimony, punctuated by periodic separations. This living arrangement was terminated in June of 1982.

Subsequent to this break up, relations between Petitioner and Sheila Thomas and her family became increasingly bitter. About 5:30 p.m. on 30 August 1982, Sheila Thomas' stepfather, Owen Griffin, was sitting in a vacant lot near his home in Marrero, Louisiana, playing cards with his neighbors, when he heard shots ring out from the Griffin residence. He rushed to the house and ran inside, whereupon more shots rang out.

When the police arrived, they found five bodies sprawled about the living area of the house. Along with Sheila Thomas and her four year old daughter, Shantell, were the bodies of Carl Osborne, the father of Shantell, Owen Griffin, and his wife, Myrtle Griffin. All had sustained multiple gunshot wounds. Each had been shot in the head at close range.

A jury convicted Petitioner of three counts of first degree murder and two counts of manslaughter. Following the presentation of evidence during the sentencing phase of the trial, the jury unanimously recommended the death sentence. On 29 May 1984 Petitioner was sentenced to death on each count of first degree murder. The Louisiana Supreme Court affirmed the jury's

findings and the sentence on 2 December 1985. The trial court signed Petitioner's death warrant on 3 September 1986, setting his execution for 19 November 1986. In the trial court proceedings, Petitioner filed a petition for post-conviction relief, habeas corpus, evidentiary hearing and stay of execution on 12 November 1986. The trial court denied Petitioner's petition on 14 November 1986. Petitioner filed the instant motion with this court on 17 November 1986, two days before the date of execution. He asserted sixteen claims for relief. This court stayed Petitioner's execution on 18 November 1986.

Following a conference with counsel for Petitioner and the State, this court granted Petitioner's request for an evidentiary hearing, setting it for 12 February 1987. At the evidentiary hearing, which included testimony from Petitioner at Angola, Petitioner was permitted to introduce evidence and testimony to support the contentions hereafter discussed.

CLAIM 1 Instruction of the Jury

In his first claim for relief, Petitioner asserts that the aggravating circumstance that formed the basis for the death sentence, as applied in this case, violates the eighth and fourteenth amendments because the jury was improperly instructed.

Petitioner was sentenced to death by the jury on the basis of its finding two statutory aggravating circumstances: La. Code Crim. Proc. Ann. arts. 905.4(d) and 905.4(h). The Louisiana Supreme Court found that the evidence adduced at trial was insufficient to support the aggravating circumstance set forth in article 905.4(h). Thus, the aggravating circumstances upon which Petitioner's sentence stands is set forth in article 905.4(d): that Petitioner "knowingly created a risk of death or great bodily harm to more than one person.

At the sentencing phase of Petitioner's trial, the court instructed the jury that in order to find the existence of

the aggravating circumstance set forth in La. Code Crim. Proc. Ann. art. 905.4(d), it was required to find that Petitioner knowingly created a risk of death or great bodily harm to more than one person. Petitioner claims that the court was obligated to instruct the jury that it had to find that Petitioner "acted with *specific intent* to kill more than one person and actually caused the death of one person and the risk of death or great bodily harm to at least one person, *all by a single act or by a series of acts in a single consecutive course of conduct.*" Petitioner's brief, at 20 (emphasis in original). For support of this assertion Petitioner cites *State v. Williams*, 480 So.2d 721, 726 (La. 1985). Because the jury was not instructed in accordance with the holding in *Williams*, Petitioner argues, the aggravating circumstances upon which he was sentenced could not provide the discretion-guiding function required by the United States Supreme Court. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

In *Williams*, decided subsequent to Petitioner's conviction and sentencing, the issue was whether the evidence was sufficient to prove both that (1) defendant acted with a "specific intent to kill . . . more than one person" (one of the aggravating elements in La. Rev. Stat. Ann. § 14:30's definition of first degree murder that must be proved in the guilt phase), and (2) that defendant "knowingly created a risk of death . . . to more than one person" (the aggravating circumstance of article 905.4 (d) that must be proved in the penalty phase). The *Williams* court held that the two statutes should be construed similarly, even though one defines the crime and the other involves the standards for jury discretion in sentencing. Regarding article 905.4(d), the *Williams* court observed that

> the Legislature intended to classify among the most serious murders those in which the murderer specifically intended to kill more than one person and

> actually caused the death of one person and the risk of death or great bodily harm to at least one other person, all by a single act or by a series of acts in a single consecutive course of conduct.

Williams, at 726.

The *Williams* court, however, did not deal with jury instructions. Its objective was to determine whether the evidence supported the jury's affirmative finding of an aggravating circumstance in both the guilt and penalty phases. In a factual setting less compelling than the instant one, the *Williams* court found that the evidence supported the jury's findings. The Louisiana Supreme Court had the same opportunity in the instant case and likewise determined that the evidence adduced at trial supports the jury's findings. This court finds no constitutional defect in that court's conducting of its appellate review.

CLAIM 2 Duplication of the Elements of the Underlying Crime in the Aggravating Circumstances

In his second claim for relief Petitioner asserts that the aggravating circumstance upon which the death sentence is based merely duplicates the elements of capital, or first degree, murder under Louisiana law. As such, Petitioner argues, the statutory aggravating circumstance in this case does not provide a rational basis for the imposition of the death penalty.

Petitioner was convicted of three counts of first degree murder and two counts of manslaughter. Under La. Rev. Stat. Ann. § 14:30 A.(3), first degree murder is the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The elements required to prove the existence of the sole aggravating circumstance upon which Petitioner's death sentence is based, La. Code

Crim. Proc. Ann. art. 905.4(d), are, indeed, duplicative of the elements needed to prove the underlying crime of first degree murder. Petitioner argues that this violates constitutional requirements as set forth by the United States Supreme Court.

In 1972 the United States Supreme Court struck down as violative of the eighth and fourteenth amendments death sentences imposed under statutes that left juries with "untrammeled discretion" to impose or withhold the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later, in *Gregg v. Georgia*, 428 U.S. 153, *reh'g denied* 429 U.S. 875 (1976), the Court ruled that Georgia's death penalty statute was constitutional. *Furman* and *Gregg* thus form the datum from which this Court's analysis must proceed.

After summarizing its former problems with affording juries untrammeled discretion, the *Gregg* court set forth a general exposition of sentencing procedures that would satisfy the concerns of *Furman*. Specifically, Georgia's statute set up a bifurcated process whereby after the jury first found that the defendant was guilty of murder, it would then pass upon the sentence to be imposed in a separate process. Georgia narrowed the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which must be found to exist after the guilt phase to impose a death sentence. Georgia defined murder as when a person "unlawfully and, with malice aforethought, . . . causes the death of another human being. . . ." Ga. Code Ann. § 26-1101 (1978). Thus, Georgia's statutory aggravating circumstances narrowed the class of persons eligible for the death penalty and reasonably justified the imposition of a more severe sentence on some people than on others convicted of the same underlying crime. The unifying theme of all Supreme Court death penalty review is that to be valid, a state's death penalty must provide a reasonable distinction between those convicted

murderers who warrant death and those convicted murderers who do not. What is important at the selection stage, the Court has reiterated often, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862 (1983) (emphasis in the original); *See also Godfrey v. Georgia*, 446 U.S. 420 (1980).

Louisiana has a bifurcated process. Modeled after Georgia's statute, Louisiana's death scheme is different in that the *definition* of murder includes, or duplicates, the aggravating circumstances that are later used to distinguish between those convicted murderers who are to die and those who are to live. In 1979 the Louisiana Legislature amended La. Rev. Stat. Ann. § 14:30 to add the requirement of an "aggravating circumstance" as an essential element of first degree, or capital, murder. Thus, the State Legislature incorporated the discretion-channeling function of aggravating circumstances into the *definition* of first degree murder, thereby requiring the finding of an aggravating element in the guilt phase of the trial, before the offender could even be subject to a penalty hearing. It is this aspect of Louisiana's death penalty statute that Petitioner attacks as violative of the mandate of *Furman*, *Gregg*, and cases that follow.

The Louisiana Supreme Court has held repeatedly that this statute is constitutionally valid. *See, e.g., State v. Loyd*, 489 So.2d 898 (La. 1986); *State v. Knighten*, 436 So.2d 1141 (La. 1983); *State v. Clark*, 387 So.2d 1124 (La. 1980). *See also Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986); *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir. 1982). Petitioner, however, cites to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 546 (1985) for support. In *Collins*, petitioner Carl Collins was convicted in Arkansas for felony murder, specifically charged in the bill of information as murder in the course of a robbery. In Arkansas at that time not all murder was capital murder, however. To obtain a capital murder conviction,

the state needed to show the existence of at least one of six statutorily defined aggravating circumstances, one of which was felony murder. As in Louisiana, a finding of felony murder was not itself sufficient to warrant the death penalty. The jury had also to find at least one statutory aggravating circumstance, which, in Collins' case, was that the murder was committed for pecuniary gain.

The Eighth Circuit noted first that the aggravating circumstance used to sentence Collins was the same element that the state used to convict defendant of capital murder in the first place. "Thus, once Collins had been convicted for capital felony murder . . ., the jury had necessarily found one aggravating circumstance." *Collins*, at 263. Drawing from *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Zant v. Stephens*, 462 U.S. 862 (1983), and *Furman v. Georgia*, 408 U.S. 238 (1972), the *Collins* court stated that "an aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime." *Collins*, at 264. The Eighth Circuit concluded that there is "no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function [required by *Furman*, *Gregg*, *Godfrey*, and *Zant*]." *Id.* Thus, argues Petitioner, in Louisiana, if no aggravating or mitigating circumstances are found in the sentencing phase, other than those already found in the guilt phase, the jury is left to decide whether to impose death on a murderer, who also acted with a specific intent to kill or inflict great bodily harm upon more than one person, without having made any finding that narrows the class of those who have committed the same death-eligible crime. *See also Wiley v. Mississippi*, —— U.S. ——, 107 S. Ct. 304, 305 (1986) (Marshall, Brennan, JJ., dissenting) ("[T]he use of aggravating circumstances which

repeat an element of the underlying capital offense creates a substantial risk that death will be inflicted in an arbitrary and capricious manner.").

The United States Supreme Court has interpreted the eighth and fourteenth amendments as requiring the states to provide statutory aggravating circumstances as discretion-guiding aids to juries. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The rationale underlying this is that such aggravating circumstances provide a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The Supreme Court has not held, and this court does not interpret the U.S. Constitution to require, that the aggravating circumstance(s) used to sentence a defendant must be different from the element(s) of the underlying crime.

The *Collins* argument is flawed in practice. This argument requires the state to introduce something "extra" at the sentencing phase: "an aggravating circumstance to narrow the class of death-eligible criminals. To allow the state to merely reintroduce at the sentencing phase that which was determined at the guilt phase, this argument suggests, is to make the sentencing phase but a sham. However, the reality of the situation is that the jury has, necessarily, already found the existence of the aggravating circumstance(s) by the time of the sentencing phase. Moreover, the *Collins* approach uses the sentencing phase to narrow the class of death-eligible offenders; Louisiana narrows the class at the definitional stage. The death-eligible class of murderers, having been narrowed from the larger pool of murderers, then goes before the jury for its decision in both systems. What is important at this stage is that the jury, with all the information available, has the same latitude of discretion that is constitutionally mandated. In actuality, the end result is identical in either system although slightly different—albeit equally valid—routes are used in arriving there.

CLAIM 3 The Death Penalty as Discriminatorily Applied

Petitioner argues that Louisiana's death penalty, as applied, discriminates against black defendants in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. Petitioner, a black person, contends that Louisiana's capital punishment statute is discriminatorily applied on the basis of both the race of the defendant and the race of the victim. Therefore, claims Petitioner, his petition presents the identical issue on which the U.S. Supreme Court granted certiorari in *McCleskey v. Kemp, cert. granted,* —— U.S. ——, 106 S. Ct. 3331 (7 July 1986) and *Hitchcock v. Wainwright, cert. granted,* —— U.S. ——, 106 S.Ct. 2888 (9 June 1986).

This court granted Petitioner's request for an evidentiary hearing. The hearing was held on 12 February 1987 at which time Petitioner introduced testimony from Dr. Mervyn D. Smith, a Ph.D. in sociology. Dr. Smith had considerable expertise in the area of racial discrimination in the area of sentencing. However, having heard Petitioner's evidence on this claim, the court is obliged to conclude that the argument is without merit.

Petitioner further argues that because this case is similar to two cases presently before the Supreme Court, it should be stayed pending the Court's resolution of the issues. Petitioner did not, in any meaningful way, establish at the evidentiary hearing or otherwise that the instant case is controlled by the same issues that are present before the Supreme Court in *McCleskey* and *Hitchcock*. Petitioner did not produce evidence that even remotely established specific acts evidencing intentional or purposeful discrimination against him on the basis of race. *Berry v. Phelps*, 795 F.2d 504 (5th Cir. 1986); *Prejean v. Maggio*, 765 F.2d 482, 484 (5th Cir. 1984); *Spinpellink v. Wainwright*, 578 F.2d 582, 614 (5th Cir. 1978). Stated succinctly, Petitioner failed to satisfy his burden of proof that he was discriminated against. Fi-

nally, this court is obliged to deal with cases and controversies according to existing jurisprudence; until that jurisprudence changes, this Court must be unaffected by the fact that it may, some day, change.

CLAIM 4 The Introduction At Trial of Arbitrary Factors

In this claim, Petitioner argues that arbitrary factors were introduced at the sentencing phase of his trial in violation of his right to due process under the fourteenth amendment. Petitioner cites four arbitrary factors.

First was the admission of a bill of information charging Petitioner with making harassing phone calls to the primary victim, Sheila Thomas, before her death. This bill was introduced to support the State's assertion of La. Code Crim. Proc. Ann. art. 905.4(h) ("the victim was a witness in a prosecution against the defendant") as an additional aggravating circumstance. The Louisiana Supreme Court held that the evidence was insufficient to prove that Petitioner killed Ms. Thomas to keep her from testifying against him, because Petitioner was only charged with this crime after the murders had occurred. Although the Louisiana Supreme Court ruled that the evidence was insufficient, it found that "given the overwhelming enormity of defendant's crime, it is inconceivable that the additional evidence that the defendant was charged with could have prejudiced defendant." *State v. Lowenfield*, 495 So.2d 1245, 1258 (La. 1985). Petitioner takes issue with this. He argues that, far from being inconceivable, it was substantially likely that this flawed evidence could have tipped the balance in the minds of one or more jurors in favor of the death penalty, especially in light of the circumstantial posture of the case.

The federal judiciary's resistence to challenges in federal court of state court evidentiary matters by habeas corpus is firmly established. *See, e.g., Bryson v. State of*

Alabama, 634 F.2d 862, 864 (5th Cir. 1981). A violation of state evidentiary rules will not, in and of itself, invoke section 2254 habeas corpus relief. *Id.* The violation must be of such a magnitude that it constitutes a denial of fundamental fairness. *Meyer v. Estelle*, 621 F.2d 769, 771 (5th Cir. 1980); *Cronin v. Alabama*, 587 F.2d 246, 250 (5th Cir. 1979). The erroneous admission of prejudicial evidence can justify habeas corpus relief only if the error was "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir. 1976). In the instant case Petitioner was convicted of murdering five people, including a four year old girl. Each victim had been shot in the head at close range. The introduction of evidence pertaining to a petitioner's making harassing telephone calls does not rise to the level of a denial of fundamental fairness.

Petitioner's second claim is that the jury was improperly charged, as set forth more fully in Claim 1. This claim has, therefore, been dealt with in detail, *supra*.

Petitioner's third claim is that the trial court allowed evidence of a prior criminal conviction in a foreign court without first requiring proof of the reliability and fairness of the foreign proceeding. Specifically, Petitioner was convicted of attempted rape and a weapons charge in Canada.

In *Lewis v. United States*, 445 U.S. 55 (1980), the Court recognized that under the sixth amendment an uncounseled felony conviction cannot be used for certain purposes. However, the Court noted this does not mean that such a conviction cannot be used for other purposes. *Lewis* dealt with the State's use of an uncounseled felony conviction for the purpose of imposing a "civil firearms liability, enforceable by a criminal sanction." 445 U.S. at 67. The Court distinguished *Lewis* from past cases in which the use of an uncounseled felony conviction was held invalid. In those cases, the Court stated, the subsequent conviction or sentence violated the sixth amend-

ment because it depended upon the reliability of the past uncounseled conviction. However, the Court observed, federal gun laws focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Thus, the Court held, "enforcement of that essentially civil disability though a criminal sanction does not 'support guilt or enhance punishment.'" *Id.*

In *State v. Mattheson*, 407 So.2d 1150, 1164 (La. 1982), the defendant objected to the introduction at the sentencing phase of prior convictions without a showing that he had been represented by counsel. Citing *Lewis*, the *Mattheson* court stated that the convictions "were not used to enhance punishment; rather, defendant's past criminal history was merely a part of the total picture of his 'character and propensities.'" *Id.* On appeal of the denial of Mattheson's habeas petition, the Fifth Circuit noted that it is clear that a habeas petitioner has the burden of proving that the convictions used by the state were constitutionally defective. *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983). *See also Webster v. Estelle*, 505 F.2d 926, 928-29 (5th Cir. 1974), *cert. denied*, 421 U.S. 918 (1975).

In the instant case, there is nothing in the record to show that Petitioner's prior criminal record was introduced for any reason other than to illustrate a part of the total picture of his character and propensities. Petitioner has the burden of showing at least some constitutional deficiency in the prior convictions introduced at the sentencing phase. This he has not done.

In his fourth claim, Petitioner assets that the trial judge coerced a seemingly deadlocked jury into sentencing Mr. Lowenfield to death.

The jury was charged in the afternoon of 15 May 1984. It deliberated over three hours that night. The next day the jury deliberated for another two hours when defense counsel moved for a mistrial. Several hours later defense counsel re-urged his motion. The jury was

brought back into the courtroom when it indicated that it was deadlocked. The court again charged the jury, telling them that if they were unable to reach a verdict, the court would sentence petitioner to life imprisonment. In response to the court's poll, four jurors indicated that further deliberations would not be helpful. The trial judge conferred with counsel, brought the jury back into court, and asked them: "Do you feel that any further deliberations will enable you to arrive at a verdict?" The result of the second polling was that one juror was of the view that further deliberations would not be helpful. The court sent them back to deliberate. Thirty minutes later the jury came back with its verdict. Petitioner claims that by ordering the jury to continue its deliberations despite a "clear indication that the jury was hopelessly hung, the court in effect coerced the jury to quash any dissent and to return a verdict of death." Pet. Br., at 43.

In Louisiana it is the trial judge who determines when a jury is deadlocked. *State v. Monroe*, 397 So.2d 1258, 1272 (La. 1981). His decision is not to be overturned except upon a showing of "palpable abuse of discretion." *State v. Governor*, 331 So.2d 443, 451 (La. 1976). Unlike the trial judge in *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), which Petitioner cites for support, the judge in Petitioner's case did not invade the secrecy of the jury or identify a deadlocked jury's majority-minority count. Considered in light of the totality of the circumstances, the trial judge's decision to return the jury for further deliberations did not constitute a violation of Petitioner's constitutional rights.

CLAIM 5 Change of Venue

Petitioner argues that the trial court erred in not granting his motion for a change in venue. Petitioner claims that a change of venue should have been granted because of the "close working relationship" between the

judges involved in the case and the primary victim, Sheila Thomas. Moreover, Petitioner claims that the trial court conducted a voir dire on Petitioner's motion for a change of venue that was inadequate to determine the actual prejudice resulting from the pretrial publicity. According to Petitioner, the court should have presumed actual prejudice from the pretrial publicity.

Petitioner first claims that the judges were unable to adequately distance themselves from Sheila Thomas and her family. Judge Collins testified at this court's evidentiary hearing that he had had contact with the Thomas family going back many years. He recused himself, and the case was re-alloted to Judge Cannella. Petitioner then claims that because Judges Collins and Cannella are part of the same judicial "team", and because Judge Cannella also knew Sheila Thomas, Judge Cannella could not impartially try Petitioner's case. At the evidentiary hearing Judge Cannella testified about the use and make up of the judicial teams; that they are, primarily, loose organizational structures designed to ensure that at least one judge will always be available at the courthouse. Judge Cannella testified that he has no more contact with members of his judicial team than with other, non-member, judges, and that he would be no more likely to confer with members than non-members concerning any given case or issue. More to the point, Judge Cannella testified that he did not know Sheila Thomas or her family, and became aware that she had, apparently, escorted prisoners to his courtroom only after the trial proceedings in this case had begun. Lastly, both Judges Cannella and Collins testified that they had, in fact, *not* discussed the Lowenfield case at all. I find their testimony credible in all respects.

Petitioner claims that extensive pre-trial publicity permeated the local community to such an extent that he could not receive a fair trial. The trial court conducted two hearings on Petitioner's motions for a change in venue. The first hearing was held in April, 1983, eight

months after the murders and over a year prior to trial. At this hearing Judge Collins heard twenty prospective jurors questioned about their knowledge of the publicity. Of the twenty, one was disqualified for a hearing impairment, three had heard reports of the case and had formed opinions, three had neither heard nor read of the case, one knew Petitioner, and the remainder of the people had heard of the deaths but had not formed an opinion. After hearing the testimony Judge Collins denied the motion. The second hearing was held in May, 1984, just prior to the trial. Twenty-nine people were called and asked whether they had heard of the case. Ten responded affirmatively and the rest stated that they hadn't heard of the case. Of the ten, only two said they couldn't determine what effect the publicity would have on them, and only one had formed an opinion. Judge Cannella denied the motion.

Four of the jurors and alternate jurors actually selected to hear the case had heard about the series of events prior to trial. One of the accepted jurors stated that he questioned his ability to sit through the trial and be fair and unbiased. Another stated that he had a problem with the presumption of innocence, while another stated that she couldn't be sure that she could fairly serve on the jury if Petitioner failed to take the stand. Petitioner claims that the court's determination that an impartial jury could be chosen was highly questionable and, in fact, the jury actually chosen was not impartial and had been unduly prejudiced by pre-trial publicity.

Petitioner relies upon *Irvin v. Dowd*, 81 S. Ct. 1639 (1961) for the proposition that habeas relief is mandated where the trial court failed to give the defendant a full and fair opportunity to prove prejudice from pretrial publicity. The Court in *Dowd* pointed out that

> it is not required that jurors be totally ignorant of the facts and issues involved . . . . [A]n important case can be expected to arouse the interest of the

> public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id., at 1642-43. The Court went on to say that the test is whether the nature and strength of that opinion suffice to rebut the presumption of a juror's impartiality as a matter of law. The question thus presented is one of mixed law and fact. The *Dowd* Court held that "the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." *Id.*

Petitioner claims that the trial court at both hearings relied erroneously upon the statements made by the jurors themselves about their individual competence to impartially hear the case. He argues that the court should have made a more detailed and individualized questioning of the veniremen. Petitioner cites to *United States v. Davis*, 583 F.2d 190 (5th Cir. 1980) for support. In *Davis*, a case that attracted national coverage, every jury panel member had heard about the case. The trial judge asked whether any panel member felt that the publicity impaired his ability to render an impartial decision. No juror responded. The court denied defendant's request for individualized voir dire. The Fifth Circuit Court of Appeals held that "[t]he district court erred in not undertaking a more thorough examination of those panel members exposed to publicity." *Id.* The *Davis* court recognized that where pre-trial publicity is a fac-

tor, a juror's conclusory statement of impartiality is insufficient. Instead, the trial court, and not the juror, must determine, from questioning, whether the juror can lay aside any impression or opinion due to the exposure. However, this court has before it a habeas corpus review; a review of state proceedings. *Davis* dealt with appellate review of a federal district court criminal trial. The Fifth Circuit reversed the district court in *Davis* "in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, and not as a matter of constitutional compulsion." *Murhpy v. Florida*, 421 U.S. 795, 797 (1975) (citing *Marshall v. United States*, 360 U.S. 310, 313 (1959)). Further, in this case the lawyers for both sides interviewed each prospective juror individually and often at great length. The voir dire transcripts occupy several hundred pages. Even if the judge were to have asked questions of each potential juror, there would have been little he could have asked that the attorneys did not. Petitioner has failed to show that there was such pre-trial prejudice to warrant a change in venue.

Regarding the imperfections of the jurors actually chosen, this court read those applicable portions of the transcripts. Four of the jurors had heard about the case on the news. As discussed above, this, alone, means little, and Petitioner takes it no further. One of the jurors questioned his ability to sit through the whole trial and be fair-minded. However, this statement was made in the context of concern for his wife and new baby; he was worried about leaving them alone. His concern did not relate to this case as such, and once his concerns over his family were addressed, he agreed that he held no preconceptions. He was not challenged. However, one juror, Catherine Roberts, expressed an inability to not consider Petitioner's not taking the stand:

> MS. ROBERTS: . . . I know right now the idea of his not being up there, I know if I'm thinking now I'm sure it might happen.

> MR. CAPITELLI: . . . I need to know the answer now. I'm not going to get a chance to do it later. If it is causing you concern now, I need to ask you to articulate it in terms of would that effect in your mind concern you to the point you could not be totally fair?
>
> MS. ROBERTS. Yes.

Transcript, 9 May 1984, at 168. Ms. Roberts was asked a few more unrelated questions. She was not challenged. Petitioner apparently felt that she was a good juror for his cause. It may have been the way she looked, her religious affiliation (Luteran (sic)), or something else. In any event, Petitioner was satisfied with her. Further, Petitioner *did* take the stand, so Ms. Roberts's reservations were mooted.

Petitioner contends that the trial court should have *presumed* prejudice to Petitioner based upon the pre-trial publicity. He claims that the pre-trial publicity in this case so pervaded and saturated the community that a fair trial was impossible. In support of the contention that, in this instance, the court should have presumed prejudice, Petitioner cites: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980); *Shepard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). Each of those cases is distinguishable. Prejudice was presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Shepard* were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In *Rideau* the defendant "confessed" under police interrogation to the murder for which he was later convicted. A twenty minute film of this confession was broadcast three times by a television station in the community where the crime and trial took place. In reversing, the Court did not examine the jury voir dire for evidence of actual prejudice because it considered the trial "but a

hollow formality," the real trial having occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

In *Mayola*, the defendant, accused of the rape-murder of a young boy, turned himself in to authorities in a foreign state. A reporter from the town in which the trial was to take place finagled his way into the car that was used to transport the defendant. News reports of what the defendant was saying appeared as headline news each day. These stories were inculpatory and played upon the emotions of the population of a small town. Nevertheless, although these stories seemed prejudicial and, in some instances, erroneous, the court held that defendant did not meet his burden of showing the requisite pervasiveness of prejudice to warrant the court's presumption of prejudice. The trials in *Estes* and *Shepard* were overturned and prejudice presumed because the proceedings were not only infected by a background of inflammatory publicity but also by a courthouse given over to accomodate the public appetite for carnival. In the instant case Petitioner has shown neither the requisite degree or pervasiveness of prejudicial publicity nor the requisite lack of decorum in the proceedings to warrant a presumption of prejudice.

CLAIM 6

Petitioner combines various issues in support of granting his writ of habeas corpus. To clarify the arguments raised within Claim 6, the Court will review the legal issues point by point, as addressed in the original petition.

A. The Constitutionality of La. Rev. Stat. Ann. § 15:432

Petitioner first asserts that La. Rev. Stat. Ann. § 15:432 violates the due process clause of the fourteenth amendment in that the statute impermissibly shifted the burden

to the Petitioner to prove his competency to stand trial. Pet. Brief at 74. Petitioner avers that once the competency of a defendant is at issue, the burden should fall upon the prosecution to prove the defendant's fitness for trial. *See, United States ex rel. v. Franzen*, 686 F.2d 1238, 1244-45 (7th Cir. 1982); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976); *but see Mulianey v. Wilbur*, 421 U.S. 684 (1975) (Rehnquist, J., concurring); *Leland v. Oregon*, 343 U.S. 790 (1952). In *Franzen*, the Seventh Circuit Court of Appeals ruled that there was "little question that the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised." 686 F.2d at 1244. This reasoning echoed sentiments expressed in a more limited context by the Fifth Circuit in *Makris*.

The reasoned pronouncements of the Fifth and Seventh Circuits with regard to the burden of proving a defendant's fitness to stand trial are unavailing to Petitioner, who voluntarily withdrew his insanity plea and opted for an alibi defense. Petitioner was accorded three sanity hearings. The conclusion reached by all three commissions was that Petitioner was sane. Following the third sanity hearing, Petitioner took the stand of his own volition and voluntarily withdrew his insanity defense, testifying:

> . . . I plead not guilty and my reason for pleading not guilty because I wasn't in the State of Louisiana in August—August 30, 1982 the day I was accused of a crime.
>
> . . . I wished not to plead guilty by reason of insanity because reason of insanity is telling the court that this person did something he wasn't responsible for something. And to the best of my knowledge I never had no mental illness in my whole entire life and up to this moment I do not have any mental

> problems. And I advised him to withdraw the plea because it's telling, your're telling the court plainly to plead reasonable insanity. You're looking for a way out . . . . (Trial Trans. Vol. III, at 851-852).

Petitioner voluntarily determined to pursue an alibi defense. At that point, he put to rest the question of his fitness to stand trial.[1] The withdrawal of the insanity defense essentially mooted the issue of whether the three previous sanity hearings passed constitutional muster.

Petitioner's reliance on *Sandstrom v. Montana*, 442 U.S. 510 (1979) is misplaced. In *Sandstrom*, the Supreme Court reversed a criminal conviction when the trial court improperly instructed the jury by not requiring the state to prove every element of the *substantive crime* beyond a reasonable doubt. In contrast, the jury in the instant case found that the State proved every element of the substantive crime beyond a reasonable doubt. The rule of *Sandstrom* simply compels the state to prove guilt beyond a reasonable doubt concerning all the elements of the substantive crime. Moreover, as already noted, the issue is mooted by the Petitioner's withdrawal of his insanity plea for the reasons stated above.

B. The Right to be Provided with Psychiatric Assistance to Prepare a Defense Under the Sixth and Fourteenth Amendments

In this portion of his sixth claim, Petitioner contends that he was "never assigned a psychiatrist to assist him in preparing" for his defense at the original trial or at any of his subsequent appeals. Pet. Br. at 75. Petitioner contends that the denial of psychiatric assistance was in violation of the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

In *Ake*, an indigent defendant had received extensive pre-trial psychiatric evaluation. When the defendant's

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[1] It is clear that Petitioner refused to allow his counsel to present an insanity defense. Evid. Hear. at 102.

condition rehabilitated to the point where criminal proceedings could continue, the defendant's attorney informed the Court that the defendant would raise the insanity defense. Defense counsel then requested that the State provide a psychiatrist to examine the defendant concerning his "mental condition at the time of the offense." 105 S. Ct. at 1091. The trial court refused the request. On review, the Supreme Court reversed the trial court's denial of psychiatric assistance and stated:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 1097.

Any valid claims that the present Petitioner may have invoked under the *Ake* decision became moot when the Petitioner voluntarily withdrew his insanity defense. Here Petitioner "demonstrated to the trial judge" his desire to proceed with an alibi defense and not an insanity defense. Thus, the "significant factor at trial" was whether the Petitioner was in Louisiana on the day of the crime and not whether he needed psychiatric assistance for a defense that he chose not to pursue.

C. *The Trial Court's Compliance with the United States Supreme Court's Pronouncement in Pate v. Robinson*

Petitioner next avers that following his third sanity hearing on May 7, 1984, various events took place that should have prompted the trial court to order further psychiatric testing and competency proceedings of the Petitioner. The purported events included, *inter alia*, Petitioner's request that his counsel withdraw his insanity plea, his instructions to counsel not to present an

insanity defense, and counsel's motion to withdraw from representing Petitioner. *See generally*, Pet. Br. at 76-79. These and other factors now lead Petitioner to assert rights pursuant to the decision in *Pate v. Robinson*, 383 U.S. 375 (1966).

Pate is another case in a line of decisions in which the Supreme Court has attempted to outline the rights owed under the Federal Constitution to a criminal defendant whose sanity or general competency to stand trial is questioned. In *Pate*, the Court held that the defendant had not waived the issue of whether he was competent to stand trial due to his possible insanity. *Id.* at 384. Under those circumstances, the Supreme Court ruled that the Petitioner's "constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial . . ." *Id.* at 386.

In the case at bar, Petitioner was accorded three sanity hearings that delved into whether he was fit to stand trial. All three of the commissions answered in the affirmative. The trial court fulfilled the mandate of *Pate*. Furthermore, Petitioner had no standing with respect to the *Pate* decision. The trial court had no obligation to order, *sua sponte*, a fourth sanity hearing simply because, following the third such hearing, Petitioner voluntarily waived his insanity defense and adopted an alibi defense.

D. The Denial of Counsel's Motion to Withdraw and Petitioner's Motion to Replace His Counsel.

Petitoner's final contentions under Claim 6 concern his representation at trial. Invoking *Strickland v. Washington*, 466 U.S. 668 (1984) and cases following, he claims that the trial court erred in denying both his attorneys' motion to withdraw from the case and Petitioner's motion to substitute counsel.

In *Strickland*, the Supreme Court established two basic requirements for finding that a defendant has suffered ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

104 S. Ct. at 2064.

To support the claim that his counsel was ineffective, Petitioner cites to various activities that may suggest discord between him and his attorneys. A vast majority, if not all, of the purported events relate to alleged disagreements in strategy and potential conflicts between client and counsel. *See, e.g.*, Pet. Br. at 80-84. In reviewing a similar claim in Petitioner's state court proceedings, the Louisiana Supreme Court properly noted that in *United States v. Cronic*, —— U.S. ——, 104 S. Ct. 2039 (1984), the determination of whether an attorney rendered effective assistance of counsel must concentrate "on the advesarial process, not on the accused's relationship with his lawyer as such." 104 S. Ct. 2046 at n.21. Despite potential pre-trial disagreements between Petitioner and counsel, the record does not suggest that the adversarial "process los[t] its character as a confrontation between adversaries" that signals the breech of the "constitutional guarantee." 104 S. Ct. at 2045, 2046. Petitioner was accorded effective assistance of counsel in accordance with his sixth amendment rights.

Petitioner next points to the decision *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985) and asserts that the state court should have granted his motion to substitute counsel. Petitioner maintains that the presence of threatening letters and the disagreements between him and his counsel relating to the proper avenue of defense support his claim that his motion to substitute counsel should have been granted. Pet. Br. at 81-84. The facts and circumstances present here indicate that the trial court

properly denied the motion to substitute counsel. Every criminal case has the potential for disagreement between the accused and counsel about strategies. What is pertinent to this case is that the court's denial of the motion was correct. Mr. Walker had been representing Petitioner since early 1983. *See* Trial Trans. Vol. I, at 47. The motion to substitute was heard on March 14, 1984. Trial Trans. Vol. III, at 597-599. By then, Mr. Walker was intimately involved with the case. Moreover, the true basis of Petitioner's fear (which led to the motion to substitute counsel) was unfounded—as discussed by the Louisiana Court of Appeals in *State v. Lowenfield*, 450 So.2d 675, 676 (La. App. 5th Cir. 1984). Although the pre-trial period did not proceed in complete harmony, there has been no showing that the trial court's denial of the motion to substitute counsel or counsel's motion to withdraw was "unreasonable and arbitrary." *Mintzes*, 761 F.2d 287.

Petitoner's sixth claim is without merit.[2]

Claim 7 The Adequacy of the State Record

In his seventh claim, Petitoner contends that the record is inadequate to determine whether the death sen-

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[2] Intertwined in Claim 6 of the petition, the Petitioner contends that "The Louisiana Courts . . . improperly determined that Mr. Lowenfield was competent to stand trial . . ." Pet. Br. at 67. Unlike the other assertions raised under Claim 6, Petitioner fails to specifically elucidate the error of the Louisiana courts as he has done in arguments A through D. However, whether by impliedly attacking the Louisiana courts' findings as to his competency via individual arguments A through D, or, taken as a whole, all the facts and arguments raised in Claim 6, the Court finds Petitioner's assertion, that the Louisiana courts improperly found him competent to stand trial, is without merit. Petitioner was accorded three sanity hearings. He was found competent by all three commissions. For further elucidation on Petitioner's fitness to stand trial, see the discussion in *State v. Lowenfield*, 495 So.2d 1245, 1252 (La. 1985). Moreover, Petitioner made the sanity and/or competency issue moot by withdrawing his insanity defense and opting for an alibi defense. Petitioner was competent to stand trial.

tence was arbitrarily imposed. Petitioner first claims that the transcript did not contain an adequate record of the voir dire proceedings. Therefore, it is contended that the record is inadequate for review on the issue of whether peremptory challenges were used to remove potential jurors on account of their race, in violation of *Batson v. Kentucky*, —— U.S. ——, 106 S. Ct. 1712 (1986). In a similar vein, Petitioner avers that the record does not indicate whether potential jurors were excluded due to their opposition to capital punishment. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968); Pet. Br. at 85.

Petitioner cannot, on the showing made, contest the adequacy of this nine volume record, especially when there was no contemporaneous objection to the alleged error(s). *See* La. Code Crim. Proc. Ann. art. 841; *Engle v. Issac*, 456 U.S. 107 (1982). In *Batson*, defense counsel made a motion objecting to the use of the challenges. 106 S. Ct. at 1715. Similarly, in *Witherspoon*, the pertinent statements of the trial court were of record. 391 U.S. at 514, 515.

Petitioner's final argument raised under Claim 7 contests the adequacy of the record as to various issues involving pre-trial hearings and other rulings made during the course of the case. Pet. Br. at 86-87. The proceedings in the present case are memorialized in a detailed nine volume record. Limited issues, aspects, and rulings to which Petitioner did not contemporaneously object cannot now be raised here. La. Code Crim. Proc. Ann. art. 841; *Engle*.

The various arguments raised in Petitioner's seventh claim are without merit.

Claim 8 *The Trial Court's Jury Instructions Concerning the Use of Circumstantial Evidence at the Guilt Phase of the Trial*

Petitioner's eighth claim questions the validity of the trial court's jury instruction concerning criminal convic-

tions based on circumstantial evidence. Petitioner contends that pursuant to La. Rev. Stat. Ann. § 15:438, the trial court should have made it clear to the jury that a conviction based on circumstantial evidence must "exclude every reasonable hypothesis of innocence." Petitioner concedes that the desired charge was eventually given; however, he asserts that intervening instructions confused the jury. Pet. Br. at 89-90.

The State contends that no objection was lodged at trial and that Petitioner is barred from raising the issue before this Court. However, regardless of the State's contentions, Petitioner's arguments stressed in Claim 8 are without merit. The trial court instructed the jury that guilt had to be found beyond a reasonable doubt. The court also gave the charge implicit in La. Rev. Stat. Ann. § 15:438. Moreover, review of the record indicates that the charges, taken in their entirety, were not confusing. Petitioner's eighth claim is without merit.

Claim 9 Petitioner's Right to Effective Assistance of Counsel

Petitioner's ninth claim raises various factual and legal issues concerning whether he was afforded effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984). Petitioner raises six scenarios that purportedly support the claim that his counsel was ineffective.

1. Petitioner first argues that counsel's failure to move to suppress or otherwise object to the proffering of the murder weapons was both negligent and prejudicial to the Petitioner. Pet. Br. at 95. The Court is not persuaded by this initial contention. The decision to object to the admission of evidence or contest the validity of searches and seizures are decisions made by counsel based on counsel's trial strategy. So long as the specific decision does not extend beyond the "wide latitude" of practices allowed in the representation of a criminal de-

fendant, *Stickland*, 104 S. Ct. at 2065, this Court should not interfere with counsel's decision.

As testified to by Mr. Capitelli at the evidentiary hearing held on 12 February 1987, counsel for Petitioner did not object to the proffer of the murder weapons because of his trial strategy. Evid. Hear. at 108, 109. Mr. Capitelli believed that the circumstances surrounding the handling of the murder weapons was a weak part of the State's case. It was his strategy not to raise an objection to the introduction of that evidence but to later argue that the linking of the weapons was one of the weaknesses of the State's case. Evid. Hear. at 108, 109. Thus, the decision was made not to object to the introduction of the weapons. Petitioner's arguments raised under the first scenario are without merit.

2. Petitioner next argues that counsel did not adequately prepare for the sanity hearings. Pet. Br. at 101. However, Petitioner's counsel did attempt to prepare Petitioner for the sanity hearings. Evid. Hear. at 101, 102. Petitioner refused to cooperate in this preparation. *Id.* This attitude reflects Petitioner's general opposition to putting forth the insanity defense. Trial Trans. Vol. III, at 851-852.

Related to the issue of the insanity defense, Petitioner also argues that counsel was negligent and caused him "actual prejudice" by not raising the insanity defense (apparently at trial). *See* Pet. Br. at 101-103. Petitioner's argument is that despite the results of three sanity hearings and Petitioner's own insistance upon the withdrawal of his insanity defense, counsel should have girded their loins and proceeded with the insanity defense at trial irrespective of their client's expressed demand that they proceed with the alibi defense. Pet. Br. at par. 220, at 102, 103. This would have caused complete chaos at trial: on one side of the defense table, counsel would have been arguing an insanity defense, while on the other side of the table Petitioner would be

seeking to take the stand in support of his alibi defense. At best, this procedure would have been unacceptable; at worst, it would have been a mockery.

Once petitioner opted for the alibi defense, counsel properly defended him on that basis and did not proceed further with the insanity defense. Each of the issues raised in the second scenario, including the related contentions raised in Pet. Br. at 101-105, are without merit.

3. The third group of facts centers on whether Petitioner was rendered ineffective assistance of counsel due to counsel's alleged failure to "insist upon a proper record." Pet. Br. at 105. Petitioner fails to cite to any authority to substantiate his position. However, the Court finds the nine volume transcript was adequate and preserved the record for reviewing the objections that were properly and timely made by Petitioner.

4. The fourth scenario presented by Petitioner concerns counsel's failure to object to certain jury charges given by the trial court. First, petitioner contends that counsel erred by not objecting to the trial court's instruction relating to aggravating circumstances under La. Code Cr. Proc. Ann. art. § 905.4(d). Since it has already been determined that this jury charge was proper, *see* Claim 1, *supra* at 3, 4, it follows that counsel's failure to object to the proper instruction could not be in error.

Petitioner also contends that counsel erred by not objecting to jury charges relating to the circumstantial evidence. Pet. Br. at 106-107. Since it has already been determined that the circumstantial evidence instruction was not confusing, *see* Claim 8, *supra* at 25, 26, counsel's failure to object to a properly given instruction was not in error.

5. Petitioner's fifth argument raised within Claim 9 contends that counsel failed to proffer mitigating evidence during the sentencing phase of the trial. Pet. Br. at 107. During the evidentiary hearing in this Court, counsel for Petitioner testified that attempts were made

to contact Petitioner's relatives in order to convince them to come to Louisiana to testify. Evid. hear. at 111, 112. However, Petitioner's relatives neither acceded to the request nor did Petitioner desire that they be present. *Id.* Evidence of Petitioner's employment history was reiterated during the sentencing phase. *Id.* Counsel's representation of Petitioner at the sentencing phase was not inadequate.

6. The final argument raised under Claim 9 concerns counsel's alleged failure to apprise the various state courts of the relevance of the decision rendered in *State v. Williams*, 480 So.2d 721 (La. 1985). Petitioner asserts that "had the Louisiana Supreme Court been apprised of the relevancy of *State v. Williams* to Mr. Lowenfield's conviction . . .", such would have affected Petitioner's death sentence. Pet. Br. at 108. As noted above in the discussion of Claim 1, this Court is unable to conclude that the *Williams* decision lends support to Petitioner's cause. *See* Claim 1, *supra*, 3, 4. This Court notes that the Louisiana Supreme Court announced its decision in *State v. Williams* in May of 1985. The decision in Petitioner's case came down from the Louisiana Supreme Court in December of the same year. It is reasonable to conclude that the Louisiana Supreme Court was aware of and "apprised" of its own decision rendered in the same year. Petitioner was rendered effective assistance of counsel and argument six of Petitioner's ninth claim is without merit.

The Supreme Court has observed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 104 S. Ct. at 2064. Here, Petitioner's counsel rendered competent legal services and did not undermine the adversarial process. The various issues raised within the Petitioner's ninth claim are without merit.

CLAIM 10 The Identification Testimony of Diane Fauchaux

Petitioner's tenth claim asserts that the identification testimony of Diane Fauchaux should have been suppressed because it was made after the use of "unduly suggestive tactics" by the police. Pet. Br. at 110. Petitioner claims that the present identification was violative of the principles discussed in *Manson v. Brathwaite*, 432 U.S. 98 (1977).

On review of this case, the Louisiana Supreme Court considered the *Brathwaite* decision in light of the facts and circumstances of the present case. The Court concluded that the identification was reliable. *Lowenfield*, 495 So.2d at 1253, 1254. Applying the same standards of *Brathwaite*, this Court finds that the indentification was reliable and admissible at trial. Witness Fauchaux had an unfettered view of Petitioner. In addition to her visual observations, she noticed Petitioner's accent. Trial Trans. Vol. VIII at 1923. Petitioner's tenth claim is without merit.

CLAIM 11 The Trial Court's Refusal to Permit Petitioner to Recall Anita Jackson to the Stand

Petitioner's eleventh claim centers on whether the trial court erred in denying counsel's request to recall Anita Jackson to the stand. Petitioner contends that said denial was in violation of his sixth amendment and fourteenth amendment rights. Pet. Br. at 112.

It is undisputed that Ms. Jackson was not a suprise witness in the case. Petitioner's counsel knew that Ms. Jackson would testify and was actually given copies of statements that Petitioner's counsel used to conduct its cross-examination of Ms. Jackson. *See* Trial Trans. Vol. VIII at 1944-1960; Pet. Exh. C. at 53. The trial court's denial of counsel's request did not abridge Petitioner's constitutional rights. Petitioner's eleventh claim is without merit.

CLAIM 12 The Sufficiency of the Evidence for Proving Petitioner's Guilt Beyond A Reasonable Doubt

Petitioner's twelfth claim contends that since his conviction was based on circumstantial evidence, there exists a "real and substantial doubt" concerning his guilt. Following *Jackson v. Virginia*, 443 U.S. 307 (1979), the Louisiana Supreme Court rejected this same contention in the course of its careful review. *See* Pet. Br. Exh. C at 54-56. The review by the Louisiana Supreme Court comported with the guidelines set forth in *Jackson*. Further, the record contains a sufficient basis for "a rational factfinder . . . [to] have found the petitioner guilty beyond a reasonable doubt . . ." *Jackson*, 443 U.S. at 325. Petitioner's twelfth claim is without merit.

CLAIM 13 The Comparative Appellate Review of Petitioner's Sentencing

Petitioner's thirteenth claim seems to contend that Louisiana statutory law and state appellate procedures violated Petitioner's constitutional rights. Petitioner also makes bald assertions that the comparative review of his case was faulty under Supreme Court guidelines.

The procedures followed by the Louisiana Supreme Court in its comparative review of the present case evince no constitutional infirmities. *See Lowenfield*, 495 So.2d at 1260-61. On the same note, the Court "cannot say that the punishment is invariably disproportionate to the crime." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Nothing within Louisiana's substantive or procedural laws or its appellate procedures denied Petitioner his federal constitutional rights. Petitioner's thirteenth claim is without merit.

CLAIM 14 Electrocution as a Means of Punishment

Petitioner's fourteenth claim avers that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Pet. Br. at 114. Death

by electrocution does not constitute cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976); *State v. Myles*, 389 So.2d 12 (La. 1980). Petitioner's fourteenth claim is without merit.

CLAIM 15 Capital Punishment as an Excessive Penalty

Petitioner's fifteenth claim contends that capital punishment is an excessive penalty. As discussed under Claim 15, capital punishment is not an excessive penalty, *per se*, and capital punishment is not an excessive penalty within the confines of the present case. Petitioner's fifteenth claim is without merit.

CLAIM 16 Petitioner's Alleged Cumulative Violations as a Source of Constitutional Infringement

Petitioner's final argument asserts that the cumulative effect of the alleged infringements are violative of his constitutional rights. The Court has found that the arguments put forth in each of Petitioner's first fifteen claims do not, independently, mount a constitutional challenge by which this Court could set aside this conviction or sentence. This Court also finds that the collective allegations do not present a constitutional abridgment warranting action by this Court. Petitioner's sixteenth claim is without merit.

More than what these pages reflect has gone into this Court's consideration of the issues raised in this most serious of matters. This Court has been impressed by the diligence and professionalism of able counsel for Petitioner, and, indeed, for the State of Louisiana. A very wide-ranging consideration of all the issues has resulted from their respective input. All considered, the petition must be DENIED. Judgment accordingly.

Signed this 31st day of March, 1987.

/s/ Peter Beer
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3305

LESLIE LOWENFIELD,
Petitioner-Appellant,

versus

C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA, *et al.*,
Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(May 11, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:

The petitioner, Leslie Lowenfield, was convicted of the first degree murder of three persons; the court sentenced him to death on each count on the jury's recommendation. The conviction and sentence was affirmed by the Louisiana Supreme Court, *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S.Ct. 2259 (1986). Post

conviction relief was denied by the state court. *Lowenfield v. Phelps*, 497 So.2d 301 (La. 1986). On Lowenfield's application for federal habeas relief, the district court stayed the execution set for November 19, 1986, so it could carefully consider the petition. Following a full evidentiary hearing, the district court denied habeas relief and vacated its earlier stay of execution; it also denied a certificate of probable cause. Lowenfield filed a notice of appeal from the district court's denial of habeas relief, and he seeks a certificate of probable cause from this court.

I.

FACTS

Petitioner, a native of Guyana, came to Louisiana from Canada in June 1981 and met the primary victim, Sheila Thomas, a deputy sheriff in Jefferson Parish, Louisiana, shortly thereafter. Ms. Thomas, along with her young daughter, victim Shantell Osborne, moved in with Lowenfield later in the summer of 1981. Lowenfield and Ms. Thomas lived together off and on for approximately one year. During this year, Ms. Thomas left Lowenfield on three separate occasions and returned to live with her mother. Lowenfield became increasingly bitter following each separation. When Ms. Thomas returned to her mother's home for the last time, he repeatedly threatened and harrassed Ms. Thomas and her mother, victim, Myrtle Griffin.

In the late afternoon of August 30, 1982, Owen Griffin, Sheila Thomas' stepfather, was in a vacant lot near his home in Marrero, Louisiana playing cards with friends. Owen Griffin heard shots ring out from his home, and ran to the house and rushed inside whereupon more shots rang out. When the police arrived, they found five bodies sprawled about the living area of the house; they found the bodies of Sheila Thomas, her four-year old daughter Shantell, Owen Griffin, his wife Myrtle Griffin, and Carl Osborne, the father of Shantell. All of

the victims had sustained multiple gunshot wounds; each had been shot in the head at close range.

For a more detailed statement of the facts, see the Louisiana Supreme Court's decision in *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S.Ct. 2259 (1986). We now turn to the specific issues raised by petitioner; we will discuss the facts further as needed in our discussion of these issues.

II.

A. Duplication of the Elements of the Underlying Crime and The Aggravating Circumstances

Petitioner argues that the single aggravating circumstance upon which his sentence was based: knowingly creating a risk of death to more than one person, is simply a duplication of the aggravating circumstance the state was required to prove to establish his guilt of first degree murder, specific intent to kill more than one person.[1] Petitioner argues that this aggravating circumstance fails to narrow the class of persons eligible for the death penalty because it does nothing more than duplicate an element of the crime. Petitioner relies primarily on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S.Ct. 546 (1985). In *Collins*, the Eighth Circuit concluded that there is "no escape from the conclusion that an aggravating circumstance which merely

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[1] La.R.S. 14:30(3) provides:

> First degree murder is the killing of a human being:
>
> * * * *
>
> (3) When the offender has specific intent to kill or inflict great bodily harm upon more than one person;

La. C. Cr. P. Art. 905.4(d) provides:

> The following shall be considered aggravating circumstances:
>
> * * * *
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;

repeats an element of the underlying crime cannot perform the narrowing function [required by the Supreme Court]." *Id.* at 264. But, we expressly rejected this analysis in *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986), where we stated "we fail to see why aggravating circumstances narrow the sentencing discretion any less by being made a constituent element of the crime. The State of Louisiana is entitled to authorize capital punishment for persons guilty of these aggravated acts where the jury does not find that mitigating circumstances justify less than the death penalty." *See also Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987); *Wilson v. Butlers*, 813 F.2d 664 (5th Cir. 1987). Thus, based upon clear precedent from this circuit we reject petitioner's arguments presented in this claim.

B. The Trial Court's Failure to Permit Defense Counsel To Withdraw and Appoint Substitute Counsel

Shortly before the trial was scheduled to begin, appointed counsel moved for permission to withdraw as counsel of record. This motion was predicated primarily on counsel's disagreement with Lowenfield over petitioner's refusal to permit them to urge insanity as a defense; the motion was also based on a letter Lowenfield sent counsel threatening them and their families.

Counsel testified at the habeas hearing that the motion to withdraw resulted primarily from their inability to persuade petitioner to urge an insanity defense. Mr. Capitelli testified that once the decision was made to follow Lowenfield's wishes and rely on the alibi defense, his relationship with Lowenfield was good. Both counsel testified that they had little concern about the threatening letter after they learned that it was mailed from the prison where Lowenfield was confined.

The trial judge had to consider whether relieving counsel who were familiar with the facts would result in an inordinate delay of the trial and encourage similar disagreements to seek further delays. The trial judge had

no reason to believe that Lowenfield would enjoy any better relationship with a new attorney.

The Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984), held that the determination of whether an attorney rendered effective assistance of counsel must concentrate "on the adversarial process, not on the accused's relationship with his lawyer as such." *Id.* at 657 n.21. Based upon the trial record and the testimony before the district court at the habeas hearing, we are persuaded that the adversarial process remained intact during this trial. Petitioner has not demonstrated that the trial court's denial of the motion to substitute counsel was "unreasonable and arbitrary." *Wilson v. Mintzes*, 761 F.2d 275, 287 (6th Cir. 1985).

C. Ineffective Assistance of Counsel

Petitioner contends that his attorneys rendered ineffective assistance of counsel in both the guilt and penalty phases of his trial. We are guided by the teaching of *Strickland v. Washington*, 466 U.S. 668 (1984) on this question in which the Court established two basic requirements for finding ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. The Court further explained that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting

> effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (citations omitted).

The Court continued:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691. With these principles in mind, we examine the particular claims of petitioner.

1. Trial Counsel's Failure to Produce Evidence of Mitigation at the Sentencing Hearing.

On this claim petitioner complains primarily of counsel's failure to produce evidence of Lowenfield's mental impairments at the sentencing hearing.

Before the sentencing hearing began, Lowenfield and his attorneys discussed whether they should adduce psychiatric testimony. Lowenfield was strongly opposed to it[2] and ultimately persuaded counsel that for tactical reasons this decision was sound. Counsel, at the federal habeas hearing, explained that he believed that the jury had doubts about Lowenfield's guilt that had been difficult for them to resolve. He and Lowenfield concluded that the presentation of psychiatric testimony would telegraph an admission to the jury that Lowenfield had committed the crime and remove any remaining doubts by the jurors of Lowenfield's guilt; they thought that preserving this possible doubt of guilt was more likely to benefit petitioner than psychiatric testimony. Counsel concluded that:

> [the presentation of] psychiatric [evidence] would in effect possibly be more detrimental than helpful because what would have happened would be that we'd have the one psychiatrist concerning his possibility of being insane at the time of the crime and they have three or four psychiatrists saying he was sane at the time of the crime and at that point any jurors that may have been misgiven about his guilt would no longer have those misgivings. He [Lowenfield] expressed to me he didn't want to go forward with that. The more I thought about it, the more I examined it, how long the jury was out, I agreed with that.

Habeas hearing record p. 103.

Lowenfield's mental condition was explored as fully as possible by counsel, given petitioner's lack of cooperation. Counsel and the petitioner considered whether the psychiatrists' testimony would undermine the apparent doubt

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[2] Immediately before the sentencing hearing began, Lowenfield, outside the presence of the jury, told the court that he opposed the presentation of psychiatric testimony in this phase of the trial. Trial Transcript at 2306.

some of the jurors had of petitioner's guilt. They consciously decided that preserving the doubt of guilt would serve them better. Considering the deference we must give strategic trial decisions under *Strickland*, the failure of counsel to call a psychiatrist was not deficient performance. *Id.* at 689-91.

The only other specific complaint of substance about counsel's performance at the sentencing phase of the trial was his failure to call petitioner's relatives to testify on his behalf. The district court credited counsel's testimony that the petitioner did not wish his relatives to be present at the trial and that in any event the family members were unwilling to come to Louisiana to testify. Both of these findings are supported by evidence presented at the habeas hearing. See Habeas record at p. 111.

Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987), relied upon by petitioner, is easily distinguished. In *Wilson*, counsel did not secure a psychiatric evaluation of his client despite signals that he was suffering from mental defects. Petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect. No other psychological evidence was in the record. Because the district court conducted no hearing, we held that the record did not "contain sufficient evidence from which the district court could determine whether Simmons [counsel] made a considered strategic decision or whether this decision was reasonable." *Id.* at 672. We remanded for an evidentiary hearing on the question of whether counsel's performance was effective including whether the decision not to produce psychiatric evidence at the sentencing hearing was a considered strategic decision.

In this case the district court conducted a full evidentiary hearing. In contrast to counsel in *Wilson*, Lowenfield's attorneys fully explained petitioner's mental condition; counsel provoked three separate sanity hearings in which a total of four psychiatrists testified after examining Lowenfield. Counsel was present when each

of the psychiatrists interviewed petitioner. Counsel consulted with psychiatrist, Dr. Richard Richaux, also agreed to testify if Lowenfield agreed to permit it. Counsel consulted with Lowenfield about the desireability of presenting psychiatric testimony at the sentencing hearing and both petitioner and counsel decided against it for strategic reasons which counsel articulated in the hearing.

The record fully supports the district court's conclusion that counsel's representation of petitioner at the sentencing hearing was adequate.

2. Counsel's Failure to Object to the Admission of the Murder Weapons

Both weapons that were later established as the murder weapons were discovered by relatives of Sheila Thomas after the murders; one of Ms. Thomas' brothers discovered the rifle the next day under bed coverings on Ms. Thomas' bed while he was preparing to clean the house; another relative discovered the pistol a week later in a heater vent.

Counsel recognized that the failure of the police to discover the guns and the imperfect documentation of the chain of custody of the weapons could create problems for the state. Mr. Capitelli, lead counsel for the petitioner, testified at the habeas hearing that he was persuaded that strategically it was to Lowenfield's advantage to acquiesce in the introduction of the weapons to set the stage for an argument that others were implicated in the murders and that the sloppy police work reflected adversely on the state's entire case.[3] Given the "wide

[3] The reason why I didn't [object to the introduction of the weapons] was totally strategic, a strategic decision I made at the time because at that point, to have objected to the guns, to have objected to the introduction of the guns would have given the prosecutors the chance to argue at the closing phase, Mr. Capitelli wants to use these guns to point at a possible implication of other individuals, yet if you recall, he objected

latitude" allowed counsel by *Strickland*, 466 U.S. at 689 in confecting trial strategy, the district court did not err in concluding that counsel did not perform ineffectively in deciding to allow the weapons to be introduced without objection.

3. Counsel's Failure to Properly Prepare for the Sanity Hearings

Petitioner's counsel made substantial efforts to prepare petitioner for the sanity hearing but petitioner refused to cooperate. Shortly before the trial was scheduled to begin, Lowenfield refused to be interviewed by psychiatrists. The district court, after hearing testimony from counsel and from Lowenfield, did not err in concluding that counsel made reasonable efforts to prepare Lowenfield for his sanity hearing and to persuade him to cooperate; Lowenfield adamantly refused to do so. The district court correctly found no ineffective assistance of counsel in this respect.

4. Counsel's Failure to Investigate the Insanity Defense and to Present this Defense at Trial

This argument is meritless for two reasons. First, the available evidence would hardly have supported a vigorous insanity defense. Three sanity commisions found that Lowenfield was sane with only a single disenting psychiatrist, Dr. Richaux. At the third sanity hearing Dr. Richaux admitted that he did not have "a definitive opinion concerning Mr. Lowenfield's sanity at the time of the offense," but he expressed his tentative opinion that "there is a good possibility that Mr. Lowenfield could have been psychotic" at that time. According to Mr.

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strenuously to the introduction of these guns, and that was one of the major considerations I felt, in retrospect and at the time that the guns involved were one of the strongest things we could point to to shift the light off of Leslie.

Habeas record p. 109.

Capitelli's testimony at the federal habeas evidentiary hearing, Dr. Richaux was the only psychiatrist who was able to give favorable testimony on the issue of Lowenfield's insanity defense, and his testimony would have likely been rebutted by the remaining psychiatrists from the insanity commission who believed that Lowenfield was sane at the time of the offense.

Second, Lowenfield's refusal to agree to the assertion of an insanity defense precluded counsel from obtaining more evidence. Lowenfield simply would not talk about the insanity defense. He refused to be interviewed by any more psychiatrists, and he would not submit to the psychiatric tests his attorneys had set up for him. Considering the paucity of available evidence to support an insanity defense and Lowenfield's refusal to cooperate in the search for additional evidence, we find no error in the district court's conclusion that counsel was not unreasonable in following their client's instructions and asserting an alibi defense.

We also reject the contention that counsel should have simultaneously asserted at trial both an alibi defense and an insanity defense. We agree with the district court that "this would have caused complete chaos at trial: on one side of the defense table, counsel would have been arguing an insanity defense, while on the other side of the table petitioner would be seeking to take the stand in support of his alibi defense." Lowenfield repeatedly insisted that his attorneys should present an alibi defense and not an insanity defense. Lowenfield's directions were entitled to be followed. The circumstances are extremely rare when counsel is not required to follow his client's instructions on a decision of this nature. *See Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) (attorney's conduct was not constitutionally deficient when he acceded to client's preference for the death penalty over a long prison term). This is not one of those rare cases.

Our reading of this record persuades us that Lowenfield received a vigorous defense. Lead counsel, Mr. Capi-

telli, had worked as a chief assistant district attorney in Orleans Parish, Louisiana, before engaging in private practice and had been involved in forty to fifty capital cases. Our review of this record reveals no failure in the adversary process.

D. Coercion of a Deadlocked Jury Into a Verdict

The jury was charged following the guilt phase of the trial on May 14, 1984 at 11:45 a.m.; they deliberated until 7:45 p.m. when the trial court recessed for the night at the jury's request. The jury resumed its deliberations the next day at 10:05 a.m., and returned with its guilty verdicts at 3:05 p.m.

The sentencing hearing, according to Judge Cannella, commenced three hours later, at 6:05 p.m., and concluded at 8:17 p.m. Following the sentencing hearing, the jury deliberated until 11:55 p.m., at which time the trial court recessed for the night at the jury's request. The jury reconvened the next day, May 16, 1984, at 9:40 a.m. Two hours later defense counsel moved for a mistrial arguing that the elapsed deliberation time, five hours, and the last instruction by Judge Cannella at the guilt phase justified a mistrial.[4] Approximately three hours

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[4] The supplemental instruction relied upon follows:

> Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you put in.
>
> In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you [sic] should not hold against either the state or the defendant in this case.
>
> Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

Trial Transcript at 2299.

later, counsel reurged their motion. While counsel were arguing their motion for mistrial, the trial judge received a note from the jury indicating that it was deadlocked. The trial court then polled the jury and asked them "do you feel that any further deliberations will enable you to arrive at a verdict?" One juror responded negatively; the balance of the jury answered the question affirmatively. The court instructed the jury to continue its deliberations and repeated parts of its earlier charge, including the statement that if they were unable to reach a verdict, the court would sentence the petitioner to life imprisonment.[5] Thirty minutes later the jury returned its verdict.

The trial judgment must enjoy wide discretion in determining when to declare a mistrial on grounds of a deadlocked jury. *Monroe v. Blackburn*, 748 F.2d 958, 961 (5th Cir. 1984). To amount to a constitutional deprivation, the trial judge's action must constitute coercion that denies the accused a fundamentally fair trial. *Bryan v. Wainwright*, 511 F.2d 644, 646 (5th Cir. 1975).

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[5] The Court instructed the jury:

> Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room.

Trial transcript at 2350-51.

Our review of this record leads us to agree with the district court that there is no showing of coercion; the record certainly does not demonstrate coercion sufficient to render the trial fundamentally unfair. The jury deliberated thirteen hours before reaching a verdict in the guilt phase and nine and one-half hours before reaching a verdict in the penalty phase. Petitioner does not challenge either supplemental instruction the court gave the jury, and we see nothing about those instructions that can be characterized as coercive. The trial court did not deprive petitioner of a fundamentally fair trial by allowing the jury to deliberate for thirteen hours on the guilt phase and nine and one half hours on the penalty phase. This claim has no merit.

E. Louisiana Improperly Shifted the Burden to Petitioner to Prove his Competence, Improperly Relieved the State of its Burden to Prove Petitioner's Competency and Improperly Refused to Appoint a Psychiatrist to Assist in Presenting an Insanity Defense at Trial.

Lowenfield next argues that he was impermissibly required to carry the burden of proof that he was incompetent to stand trial. Louisiana law presumes the defendant's sanity. La. Rev. Stat. 15:432. The defendant carries the burden of proving by a clear preponderance of the evidence that as a result of a mental disease or defect he lacks the capacity to understand the proceedings against him or to assist in his defense. La. C. Cr. P. Art. 641. *State v. Machon*, 410 So.2d 1065 (La. 1982). Lowenfield argues that this statutory scheme violates the due process clause of the fourteenth amendment. We disagree.

Lowenfield principally relies on *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238 (7th Cir. 1982). *Bilyew* involved a state murder conviction under an Illinois statute that placed the burden on the defendant to

prove his incompetency to stand trial. *Id.* at 1238. The Illinois Supreme Court upheld the conviction despite its own intervening decision that the statute's apportionment of the burden of proof was unconstitutional. *Id.* at 1244. The district court denied the defendant's petition for habeas corpus and held that any error in misallocating the burden of proof was harmless regardless of whether the statute was unconstitutional. *Id.* at 1244. The Seventh Circuit reversed and held that the error of misallocating the burden of proof was not harmless because "the evidence was very close" and there was a "reasonable possibility" that the defendant would have been found incompetent to stand trial if the state were required to carry the burden of proof. *Id.* at 1246.

Lowenfield relies on *Bilyew*'s statement that "the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised." *Id.* at 1244. No circuit court has followed this rule, and we refuse to follow it for several reasons. First, *Bilyew*'s conclusion that a state may not constitutionally place the burden of proving incompetency on the defendant merely echoes the opinion of the Illinois Supreme Court.

Second, in declaring that both state and federal prosecutors are required to shoulder the burden of proving competency, we believe *Bilyew* confused the requirements imposed upon federal prosecutors by federal statute with the latitude ordinarily accorded state legislatures under state law to decide the placement of the burden of proof. There is no question that in federal prosecutions, the government bears the burden of proving the defendant's competence to stand trial by a preponderance of the evidence. 18 U.S.C. § 4241. *See United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), *cert denied*, 429 U.S. 1038; *United States v. Makris*, 535 F.2d 899, 905 (5th Cir. 1976), *cert. denied*, 430 U.S. 954. Nevertheless, *Bilyew*

cites *DiGilio* and *Makris* for the proposition that state prosecutors likewise bear the burden of proving competence. Both *Digilio* and *Makris* were decided under the federal criminal statute for determining competency, however, and they have no applicability to the state's latitude to determine burdens of proof in an orderly fashion. We see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant merely because Congress chose to place that burden on the government in federal prosecutions.

Third, even if *Bilyew* was correct that federal due process prohibits the allocation of the burden of proof to the defendant on this issue, the determination in the instant case is harmless error. Notably, the trial court never relied on the presumption in finding that Lowenfield was competent to stand trial. Furthermore, the evidence strongly supports the court's determination that Lowenfield was competent to stand trial, and there is no reasonable probability that a different burden of proof would have made a difference. The test of competency has long been established by the Supreme Court as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). The evidence of Lowenfield's competence to stand trial satisfies both *Dusky* and the similar test under Louisiana law announced in *State v. Bennett*, 345 So.2d 1125, 1138 (La. 1977). Lowenfield exhibited his ability to make important decisions by rejecting the use of the insanity defense in a reasoned manner.[6] The record reflects that

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[6] The defendant testified:

> . . . I plead not guilty and my reason for pleading not guilty is that I wasn't in the State of Louisiana in August . . . August 30, 1982, the day I was accused of a crime. . . . I wished not to plead not guilty by reason of insanity because reason of

Lowenfield also took notes during the course of the trial in order to assist his trial counsel. He also furnished names and addresses of alibi witnesses in Florida. Most importantly, none of the doctors on the sanity commission identified a mental disease or defect which could form the basis of a finding of incompetency. The psychiatrists on the three sanity commissions were unanimous in their opinion that Lowenfield was competent to stand trial, with the sole exception of Dr. Richaux whose determination was based on the problems associated with Lowenfield's belief that his attorneys were in a conspiracy against him, rather than the existence of any mental disease or defect.

Any right to a psychiatrist to assist in the presentation of the defense became moot after petitioner voluntarily withdrew his insanity defense. The only issue at trial became whether petitioner was in the vicinity of New Orleans, Louisiana on the date of the crime and not whether he suffered from mental deficiencies. The district court correctly rejected petitioner's claims for habeas relief predicated on these grounds.

Petitioner also contends that counsel had no opportunity to present psychiatric testimony in the sentencing hearing because the court only allowed a short recess after the guilty verdict was rendered and before the sentencing hearing began. As discussed earlier, Lowenfield and counsel made a considered decision not to present psychiatric testimony and petitioner did not ask the trial court for a further recess within which to obtain psychiatric testimony. This argument also has no merit.

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insanity is telling the court that this person did something he wasn't responsible for something. And to the best of my knowledge I never had no mental illness in my whole entire life and up to this moment I do not have any mental problems. And I advised him to withdraw the plea because its telling, you're telling the court plainly to plead reasonable insanity. You're looking for a way out . . . .

F. Arbitrary Factors Introduced at the Sentencing Hearing in Violation of the Eighth and Fourteenth Amendments

Petitioner first argues that the admission of a bill of information filed more than a month after Ms. Thomas' death charging petitioner with making harrassing phone calls is an arbitrary factor that requires issuance of the writ. The bill of information was offered by the state to show the presence of the second aggravating circumstance: that one of the victims was a witness in a prosecution against the petitioner. The Louisiana Supreme Court held that the state failed to establish this aggravating factor because the bill of information was not pending at the time of Ms. Thomas' murder. The Louisiana Supreme Court also determined that the trial court erred in admitting this bill of information but concluded that "[g]iven the overwhelming enormity of defendant's crime, it is inconceivable the additional evidence that the defendant was charged with making harrassing phone calls could have prejudiced defendant." *State v. Lowenfield*, 495 So.2d 1245, 1258 (La. 1985). In order to rise to constitutional proportions, a violation of state evidentiary rules must be of such a magnitude that it constitutes a denial of fundamental fairness. *Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir.), *cert. denied*, 440 U.S. 974 (1974). Given the relative insignificance of this item of evidence in the prosecution of a crime as heinous as this, we agree with the the Louisiana Supreme Court that it was not prejudicial; its admission certainly does not rise to the level of a denial of fundamental fairness.

Petitioner's second evidentiary point is also meritless. Petitioner complains of the introduction, during the sentencing hearing, of evidence of his conviction of attempted rape in Canada. He complains that no showing was made that the defendant was afforded all of the constitutional protection in the Canadian case to which he would otherwise be entitled under United States law. *Lewis v. United*

States, 445 U.S. 55, 57 (1980). But, this is not the standard that applies to a sentencing hearing in a capital case.

In *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983), we made it clear that a habeas petitioner has the burden of proving that convictions used by the state in a sentencing hearing to illustrate the petitioner's character propensities were constitutionally defective. A trial court has broad discretion in the sentencing phase of a capital case to permit the jury to receive relevant information that will assist them in predicting the future behavior of the accused. *See Milton v. Procunier*, 744 F2d. 1091, 1097 (5th Cir. 1984).

G. Change of Venue

Petitioner argues that the trial court erred in denying his motion for a change in venue predicated on two arguments: pretrial publicity and the close working relationship between the victim, Sheila Thomas, and judges of the court in which petitioner was tried.

The evidentiary hearing conducted by the district court fully supports the district court's finding that the trial judge, Judge Canella, was not personally acquainted with Sheila Thomas or her family and became aware that she had apparently escorted prisoners to his courtroom only after the trial proceedings in this case had begun. Ms. Thomas was one of fifteen or twenty deputies who transported prisoners to all fifteen divisions of the 24th Judicial District Court. After her death, Judge Canella recalled having seen Ms. Thomas in his courtroom but did not recall ever speaking with her. The evidence also supported the finding that the relationship between Judge Canella and Judge Collins, who did know the victim and her family, would not prevent Judge Canella from impartially trying petitioner's case. The only contact Judge Canella had with Judge Collins about this case was on the eve of one of the hearings on petitioner's motion for

change of venue; Judge Canella asked Judge Collins about the procedure he followed in handling a similar motion. This limited contact is insufficient to call Judge Canella's impartiality into question.

We also agree with the district court that petitioner has had a full and fair opportunity to establish prejudice from pretrial publicity. *See Irvin v. Dowd*, 366 U.S. 717 (1961).

The transcript of the voir dire examination occupies several hundred pages; Counsel were given wide latitude in conducting their examination. Of the jurors selected, only four recalled having heard about the case. They all verified that they could sit as a fair and impartial juror on petitioner's case.

The record in this case does not support imposition of the rule announced in *Rideau v. Louisiana*, 373 U.S. 723 (1963), that requires a court to presume the jury venire was prejudiced against petitioner. As we stated in *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981):

> The principle distilled from this holding [Rideau] by courts subsequently discussing the case is that where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, "[jury] prejudice is presumed and there is no further duty to establish bias."

The pretrial publicity in this case does not approach the level required to impose the *Rideau* rule.

Petitioner points to no evidence in the record and our review of it has disclosed none that would demonstrate the "actual identifiable prejudice" from the pretrial publicity required to warrant issuance of the writ. *Mayola*, 623 F.2d at 996.

With respect to claimed imperfections of several of the jurors actually chosen, we fully agree with the dis-

trict court's reasons for rejecting petitioner's arguments and adopt those reasons as our own.

H. Identification Testimony of Diane Faucheux

Lowenfield argues that the identification testimony by cab driver Diane Faucheux should have been suppressed because it was made as a result of "unduly suggestive tactics" by the police. A detective who knew that Lowenfield frequently used cabs showed Lowenfield's picture to various cab drivers, including Ms. Faucheaux, at the Westbank Cab Company. Ms. Faucheux, at that time, failed to identify Lowenfield as one of her passengers. Having failed to obtain an identification, the detective reviewed the taxi logs and discovered that Ms. Faucheux had picked up a fare at the petitioner's apartment on the day of the murders. The detective again asked Ms. Faucheux if she recognized Lowenfield's photograph. After being shown the log and Lowenfield's photographs, Ms. Faucheux positively identified Lowenfield as the fare she delivered one block from the murder scene; she also recalled that Lowenfield spoke with an accent. The officer then left and gave Ms. Faucheux a picture of Lowenfield with instructions to contact the police if she saw him again.

Ms. Faucheux testified that she was able to identify Lowenfield because she looked at his face when she helped him load and unload packages from the cab. Additionally, she conversed with him during the hour long ride and as a result frequently looked back in the mirror. She also got a good look at his face when he paid the fare.

Petitioner argues that the actions of the detective in showing Ms. Faucheux the single photograph of Lowenfield with instructions to contact the police if she saw factor in determining the admissibility of identification testimony is whether, under the totality of the circumstances, the identification was reliable. *Manson v. Brath-*

waite, 432 U.S. 98 (1977); *Stovall v. Denoe*, 388 U.S. 293 (1967). In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court established that "convictions based on eyewitness identification at trial following pretrial identification by photographs will be set aside on that ground only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See also Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982).

The only suggestive indicia that tends to undermine Ms. Faucheaux's identification is the act of the police in showing her a solitary picture and allowing her to keep a copy. But we conclude that this alone is not sufficient to create a "very substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 384. Because of Ms. Faucheux' close contact with Lowenfield for approximately an hour during which time she observed him closely on several occasions and heard him speak in his distinctive accent, we conclude that the "identification was encompassed by indicia of reliability." *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982). This claim is meritless.

III

Lowenfield also argues that: (1) the trial court's jury instructions on circumstantial evidence and the burden of proof were erroneous, (2) the trial court's refusal to permit petitioner to recall Anita Jackson to the stand violated petitioner's rights under the sixth and fourteenth amendments, (3) the evidence was insufficient for the jury to find petitioner guilty beyond a reasonable doubt, (4) electrocution is a cruel and unusual means of punishment, (5) capital punishment is an excessive penalty, (6) the cumulative effect of the violation of petitioner's rights constitutes a violation of petitioner's Constitutional rights. We agree with the district court that all of these

claims lack merit. We adopt the opinion of the district court on these issues and append to this opinion the relevant portion of the district court opinion.

In conclusion, because Lowenfield has not made a substantial showing of the denial of a federal right, we DENY a certificate of probable cause and also DENY a stay of execution. *See Barefoot v. Estelle*, 463 U.S. 880, 883 (1983). The mandate shall issue forthwith.

APPENDIX

Excerpts from opinion of United States District Court, Eastern District of Louisiana, dated March 31, 1987, in Civil Action No. 86-5036, Section M (1).

V.

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Regarding the imperfections of the jurors actually chosen, this court read those applicable portions of the transcripts. Four of the jurors had heard about the case on the news. As discussed above, this, alone, means little, and Petitioner takes it no further. One of the jurors questioned his ability to sit through the whole trial and be fair-minded. However, this statement was made in the context of concern for his wife and new baby; he was worried about leaving them alone. His concern did not relate to this case as such, and once his concerns over his family were addressed, he agreed that he held no preconceptions. He was not challenged. However, one juror, Catherine Roberts, expressed an inability to not consider Petitioner's not taking the stand:

> MS. ROBERTS: . . . I know right now the idea of his not being up there, I know if I'm thinking now I'm sure it might happen.
>
> MR. CAPITELLI: . . . I need to know the answer now. I'm not going to get a chance to do it later. If it is causing you concern now, I need to ask you to articulate it in terms of would that effect in your mind concern you to the point you could not be totally fair?
>
> MS. ROBERTS: Yes.

Transcript, 9 May 1984, at 168. Ms. Roberts was asked a few more unrelated questions. She was not challenged. Petitioner apparently felt that she was a good juror for his cause. It may have been the way she looked, her religious affiliation (Luteran (sic)), or something else.

In any event, Petitioner was satisfied with her. Further, Petitioner *did* take the stand, so Ms. Roberts's reservations were mooted.

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Claim 8 The Trial Court's Jury Instructions Concerning the Use of Circumstantial Evidence at the Guilt Phase of the Trial

Petitioner's eighth claim questions the validity of the trial court's jury instruction concerning criminal convictions based on circumstantial evidence. Petitioner contends that pursuant to La. Rev. Stat. Ann. § 15:438, the trial court should have made it clear to the jury that a conviction based on circumstantial evidence must "exclude every reasonable hypothesis of innocence." Petitioner concedes that the desired charge was eventually given; however, he asserts that intervening instructions confused the jury. Pet. Br. at 89-90.

The State contends that no objection was lodged at trial and that Petitioner is barred from raising the issue before this Court. However, regardless of the State's contentions, Petitioner's arguments stressed in claim 8 are without merit. The trial court instructed the jury that guilt had to be found beyond a reasonable doubt. The court also gave the charge implicit in La. Rev. Stat. Ann. § 15:438. Moreover, review of the record indicates that the charges, taken in their entirety, were not confusing. Petitioner's eighth claim is without merit.

• • • •

Claim 11 The trial Court's Refusal to Permit Petitioner to Recall Anita Jackson to the Stand

Petitioner's eleventh claim centers on whether the trial court erred in denying counsel's request to recall Anita Jackson to the stand. Petitioner contends that said denial was in violation of his sixth amendment and fourteenth amendment rights. Pet. Br. at 112.

Pit is undisputed that Ms. Jackson was not a surpise witness in the case. Petitioner's counsel knew that Ms. Jackson would testify and was actually given copies of statements that Petitioner's counsel used to conduct its cross-examination of Ms. Jackson. See Trial Trans. Vol. VIII at 1944-1960; Pet. Exh. C. at 53. The trial court's denial of counsel's request did not abridge Petitioner's constitutional rights. Petitioner's eleventh claim is without merit.

Claim 12 The Sufficiency of the Evidence for Proving Petitioner's Guilt Beyond a Reasonable Doubt

Petitioner's twelfth claim contends that since his conviction was based on circumstantial evidence, there exists a "real and substantial doubt" concerning his guilt. Following *Jackson v. Virginia*, 443 U.S. 307 (1979), the Louisiana Supreme Court rejected this same contention in the course of its careful review. *See* Pet. Br. Exh. C at 54-56. The review by the Louisiana Supreme Court comported with the guidelines set forth in *Jackson*. Further, the record contains a sufficient basis for "a rational factfinder . . . [to] have found the petitioner guilty beyond a reasonable doubt. . . . *Jackson*, 443 U.S. at 325. Petitioner's twelfth claim is without merit.

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Claim 14 Electrocution as a Means of Punishment

Petitioner's fourteenth claim avers that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Pet. Br. at 114. Death by electrocution does not constitute cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976); *State v. Myles*, 389 So.2d 12 (La. 1980). Petitioner's fourteenth claim is without merit.

Claim 15 Capital Punishment as an Excessive Penalty

Petitioner's fifteenth claim contends that capital punishment is an excessive penalty. As discussed under Claim 15, capital punishment is not an excessive penalty, *per se*, and capital punishment is not an excessive penalty within the confines of the present case. Petitioner's fifteenth claim is without merit.

Claim 16 Petitioner's Alleged Cumulative Violations as a Source of Constitutional Infringement

Petitioner's final argument asserts that the cumulative effect of the alleged infringements are violative of his constitutional rights. The Court has found that the arguments put forth in each of Petitioner's first fifteen claims do not, independently, mount a constitutional challenge by which this Court could set aside his conviction or sentence. This Court also finds that the collective allegations do not present a constitutional abridgment warranting action by this Court. Petitioner's sixteenth claim is without merit.

Sam D. Johnson, Circuit Judge, dissenting:

The supplemental *Allen* charge urging the jury to reach a verdict and the *Brasfield* inquiry into the jury's numerical division have no place in the sentencing phase of a death penalty case. A jury considering whether to impose a life or death sentence is likely to interpret these actions of the judge as a suggestion or command to choose death. With great deference to the opinion of the majority, I therefore respectfully dissent.

A.

The *Allen* charge, deriving its name from *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154 (1896), refers to "supplemental instructions urging a jury to forego their differences and come to a unanimous decision." [1] The charge, so often criticized for its coercive tendencies,[2] has been upheld [3] as not per se unconstitutional in the

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[1] United Staes v. Bottom, 638 F.2d 781, 786 n.4 (5th Cir. 1981); *see also* United States v. Taylor, 530 F.2d 49, 51 n.5 (5th Cir. 1976) ("The term 'Allen Charge' is commonly used to refer to supplemental charges given to deadlocked juries encouraging jurors to reconsider their position").

[2] *E.g.*, United States v. Blevinal, 607 F.2d 1124, 1128-29 (5th Cir. 1979) (Godbold, J., dissenting), *cert. denied*, 445 U.S. 928 (1980); United States v. Amaya, 509 F.2d 8, 12-13 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101 (1977); United States v. Vigo, 435 F.2d 1347, 1350 (5th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); Thaggard v. United States, 354 F.2d 735, 739-41 (5th Cir. 1965) (Coleman, J., concurring), *cert. denied*, 383 U.S. 958 (1966); Walker v. United States, 342 F.2d 22, 27-29 (5th Cir.) (Brown, J., dissenting), *cert. denied*, 382 U.S. 859 (1965); Green v. United States, 309 F.2d 852, 854-56 (5th Cir. 1962); Andrews v. United States, 309 F.2d 127, 129-30 (5th Cir. 1962) (Wisdom, J., dissenting), *cert. denied*, 372 U.S. 946 (1963); Huffman v. United States, 297 F.2d 754, 755-59 (5th Cir.) (Brown, J., dissenting), *cert. denied*, 370 U.S. 955 (1962).

[3] United States v. Bailey, 480 F.2d 518, 518 (5th Cir. 1973) (en banc).

usual criminal case.[4] Nevertheless, the appellate court must scrutinize[5] an *Allen* charge for compliance with "two requirements": "(1) the semantic deviation from approved '*Allen*' charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved '*Allen*' charge must not be coercive."[6] We proceed on a case by case basis[7] under a totality of the circumstances test.[8] The "potential for coercion is present in even the most mild supplemental instructions,"[9] and an *Allen* charge wholly unobjectionable in its content may nonetheless be coercive in light of the circumstances under which it was given.[10] Finally, although we should not grant habeas corpus relief to a state defendant merely because the state trial court made minor deviations from approved *Allen* charges,[11] the defendant may show in federal habeas corpus proceedings that the charge was unconstitutionally coercive[12] under the totality of the circumstances.[13]

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[4] *See Bailey*, 480 F.2d at 520 (Goldberg, J., concurring in part and dissenting in part).

[5] *Blevinal*, 607 F.2d at 1126.

[6] *Bottom*, 638 F.2d at 787; *see also* United States v. Cheramie, 520 F.2d 325, 328 (5th Cir. 1975).

[7] United States v. Kimmel, 777 F.2d 290, 294 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1947 (1986).

[8] United States v. Fossler, 597 F.2d 478, 484-85 (5th Cir. 1979).

[9] *Blevinal*, 607 F.2d at 1126.

[10] *Fossler*, 597 F.2d at 483-85; United States v. Williams, 447 F.2d 894, 899-900 (5th Cir. 1971).

[11] *See Cheramie*, 520 F.2d at 330 n.6.

[12] Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975).

[13] The majority opinion suggests that Lowenfield has not challenged the *Allen* charge. *Supra* at 17. Though he has not ex-

Similarly, trial judge inquiry into the numerical division of the jury is also coercive. In *Brasfield v. United States*, 272 U.S. 448, 449-50, 47 S. Ct. 135, 135-36 (1926), the Supreme Court condemned this practice as a ground for reversal. In *Brasfield*, the practice was condemned, even though the jury had not revealed "which number favored a conviction." A *Brasfield* inquiry, especially in conjunction with an *Allen* charge, requires reversal.[14] Debate has been sparked elsewhere over the question whether the *Brasfield* inquiry alone is a ground for relief in a federal habeas corpus proceeding.[15] At the very least, however, the presence of a *Brasfield* inquiry tends to show unconstitutional coercion under the totality of the circumstances.[16]

B.

The "effect upon a divided jury" of an *Allen* charge or *Brasfield* inquiry "will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts."[17] We cannot enter the jury room during deliberations; we cannot see into the mind of the deliberating juror. Thus, when we examine a case and test it for trial judge coercion of the jury

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plicitly challenged the wording of the *Allen* charge, Lowenfield does contend that the circumstances at sentencing, including the fact that an *Allen* charge was given, show that the jury was coerced. Petitioner's Memorandum of Law at 29-33.

[14] United States v. Chanya, 700 F.2d 192, 193-94 (5th Cir. 1983), *cert. denied*, 466 U.S. 943 (1984); *Cheramie*, 520 F.2d at 331 n.8; United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971); Cook v. United States, 254 F.2d 871, 873-75 (5th Cir. 1958).

[15] *Compare, e.g.*, Ellis v. Reed, 596 F.2d 1195, 1197 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979), *with id.* at 1201-02 (Winter, J., dissenting).

[16] *Ellis*, 596 F.2d at 1200; Jones v. Norvell, 472 F.2d 1185, 1185-86 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973).

[17] *Brasfield*, 272 U.S. at 450, 47 S. Ct. at 135-36.

under the totality of the circumstances, we must resort to reasonable inference and supposition.[18]

In the present case, the jury deliberated some thirteen hours in the guilt-innocence phase. The jury began deliberating in the guilt-innocence phase on May 14, 1984. After further deliberations on May 15, 1984, the jury reached its verdict at 3:05 p.m. in this phase of the trial. That same day, May 15, 1984, at 6:05 p.m., over defense counsel objection,[19] the trial judge began the sentencing phase of trial. He conducted the sentencing hearing, instructed the jury on sentencing, and directed the jury to begin deliberating on the question of life or death. Deliberations began at 8:17 p.m. After deliberating until 11:55 p.m. that evening, the jury complained that it was hungry and tired and that it had already come up with one verdict that day.[20] Only then did the trial judge recess for the night. The next day, May 16, 1984, at 9:40 a.m., the jury continued deliberating. It continued its deliberations for more than five hours before telling the trial judge, in a note, that it was unable to agree upon a recommendation.

In his initial sentencing charge to the jury, the trial judge had explained that, in accordance with article 905.8 of the Louisiana Code of Criminal Procedure, if "the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."[21] Nevertheless, upon the jury's representation or deadlock in its note to the judge, the

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[18] *See Cheramie*, 520 F.2d at 331-32; *Amaya*, 509 F.2d at 12-13; *Williams*, 447 F.2d at 900.

[19] "I request a twenty-four to forty-eight hour delay for purposes to give them time to cool, the jury to cool from the verdict and also in preparation."

[20] "I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired."

[21] La. Code Crim. Proc. Ann. art. 905.8 (West 1984).

trial judge for the first time declined to invoke the article 905.8 procedure. Instead, the judge had the jury return to the courtroom and instructed it again on the article 905.8 procedure. The judge then asked the jury "if further deliberations would be helpful in obtaining a verdict." The judge determined that four jurors felt further deliberations would not be helpful; eight jurors stated that further deliberations would be helpful. For the second time, the judge declined to accept the deadlock and apply the article 905.8 procedure. The judge then, purporting to rephrase the question, determined to ask the same question again. He asked, "Do you feel that any further deliberations will enable you to arrive at a verdict?" This time, eleven jurors answered yes; one juror, however, persisted in saying that further deliberations would not be helpful. For the third time, the judge declined to accept the deadlock. Instead, he gave the *Allen* charge, urging the jurors "to reexamine your own views and to change your opinion if you are convinced you are wrong" "with the objective of reaching a just verdict," and directed further deliberations. Within thirty minutes, the jury returned a verdict recommending death.

This sequence of events gives rise to a strong inference of coercion at the sentencing phase of trial. Taking the guilt-innocence and sentencing phases together, the jury had deliberated without meaningful break for approximately twenty-two or more hours.[22] When the jury first indicated its deadlock, the trial judge declined to impose life imprisonment under article 905.8, which the judge had stated would apply in the event of deadlock. The jurors dissenting from the recommendation of death might well have understood that the judge favored the death penalty. The judge then reinforced this understanding by twice polling the jury and delivering the *Allen* charge.

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[22] *See Kimmel*, 777 F.2d at 295 (length of deliberations as factor).

Four jurors were isolated by the first polling as being opposed to further deliberations. To be sure, the judge had asked, not directly about the jury's numerical division on the question or life versus death, but about its division over the helpfulness of further deliberations. Nevertheless, it is reasonable to conclude that the four jurors opposing further deliberations also opposed the recommendation of death; those jurors who would produce a deadlock by opposing further deliberations knew from what the trial judge had told them about article 905.8 that a deadlock would result in life imprisonment. Clearly, these four knew that the same logic was apparent to the trial judge.

Then, in quick succession to his first polling, the judge, while purporting to rephrase the question, effectively rejected the jurors' responses to the first polling by posing the same question. With their position on the ultimate question exposed, the four jurors might well have understood the second polling on the same question as a signal from the judge that he favored the death penalty. The result of the second polling was predictable: Four dissenters had been whittled down to one. By then rejecting this deadlock, the judge again signalled with inescapable clarity to the one remaining hold-out juror that the bench favored the death penalty. At this point, the judge urged the jurors to return a unanimous verdict. Within thirty minutes,[23] they complied.

The conjunction of the *Brasfield* inquiry and an *Allen* charge is especially condemned because

> the coercive impact of even a modest *Allen* charge is heightened when preceded by any inquiry as to the jury's numerical diversion. When that is done, the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction

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[23] *See Fossler*, 597 F.2d at 485 (shortness of time from delivery, of *Allen* charge to rendering of verdict as factor).

> and that it is, therefore, directed toward the minority jurors.[24]

In practical effect, a trial judge thereby tells minority jurors, especially when their position is known to the judge, to abandon that position. That occurred here: first to the four dissenting jurors and then a second time to the last dissenting juror.

C.

Were this an ordinary criminal case, the coercive practices outlined above would perhaps be constitutionally permissible. This is not, however, an ordinary case. Here a man has been condemned to death. Because of the "qualitative difference" between death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." [25] Consequently, the Supreme Court " 'has condemned procedures in capital cases that might be completely acceptable in an ordinary case.' " [26]

In addition to the need for extreme reliability in capital cases, the capital sentencing jury is peculiarly vulnerable to coercion, intended or effective, from the bench. In the usual criminal case, the jurors apply *common* legal norms supplied by the court's instructions. By contrast, the breadth of mitigating evidence and considerations

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[24] Cornell v. Iowa, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *see also* United States v. Sae-Chua, 725 F.2d 530, 531-32 (9th Cir. 1984).

[25] Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (footnote omitted).

[26] Strickland v. Washington, 466 U.S. 668, 705, 104 S. Ct. 2052, 2073 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting Barefoot v. Estelle, 463 U.S. 880, 913, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting)).

available to capital sentencing jurors[27] especially contributes to make theirs a "'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'"[28] Unlike jurors in the usual case, capital sentencing jurors do not necessarily apply the same norms to mitigating evidence. Under these circumstances, deadlock may readily result and persist with no available means of resolution—unless by coercion.

As a society we have evolved too far to permit such coercion of jurors in death penalty cases. Given the critical need for caution in capital cases as well as the particular vulnerability of capital sentencing jurors, the inherently coercive *Allen* and *Brasfield* practices implemented at the sentencing phase of Lowenfield's trial must be condemned as constitutionally repugnant.[29] Because the majority declines to do so, I must dissent.

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[27] Hitchcock v. Dugger, 55 U.S.L.W. 4567, 4567-69 (U.S. Apr. 22, 1987); Skipper v. South Carolina, —— U.S. ——, 106 S. Ct. 1669, 1670-71 (1986); *see* La. Code Crim. Proc. Ann. art. 905.5(h) (West 1984).

This was particularly so in the present case. As the majority opinion explains *supra* at 3-5, the single valid aggravating circumstance supporting Lowenfield's sentence had been found at the guilt-innocence phase of the trial. At sentencing, there remained only mitigating evidence to consider.

[28] Turner v. Murray, —— U.S. ——, 106 S. Ct. 1683, 1687 (1986) (opinion of White, Blackmun, Stevens, O'Connor, JJ.) (quoting Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2645 n.7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900, 103 S. Ct. 2733, 2755 (1983) (Rehnquist, J., concurring in judgment))).

[29] *See* Rush v. State, 491 A.2d 439, 448-54 (Del. 1985); Patten v. State, 467 So. 2d 975, 975, 979-80 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985); Rose v. State, 425 So. 2d 521, 524-25 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983).

SUPREME COURT OF THE UNITED STATES

No. 86-6867

LESLIE LOWENFIELD,

Petitioner

v.

C. PAUL PHELPS, SECRETARY LOUISIANA DEPARTMENT OF CORRECTIONS, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered that this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2 presented by the petition.

June 22, 1987